SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 194.

RIVERDALE COTTON MILLS

v.

ALABAMA AND GEORGIA MANUFACTURING CO. ET AL.

BRIEF FOR APPELLANT ON WRIT OF CERTIORARI.

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WILLIAM H. DUNBAR,
Of Counsel for Appellant.

Supreme Court of the United States.

October Term, 1904.
No. 194.

RIVERDALE COTTON MILLS.
vs.
ALABAMA AND GEORGIA MANUFACTURING COMPANY ET AL.

BRIEF FOR APPELLANT ON WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This is a writ of *certiorari* issued on a petition by the Riverdale Cotton Mills, a corporation organized under the laws of Georgia, to review a decree of the Circuit Court of Appeals for the Fifth Circuit dismissing for want of jurisdiction a bill filed by the appellant against the appellees, the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company, in the Circuit Court for the Northern District of Georgia. The following are briefly the material facts as shown by the record:

The Alabama and Georgia Manufacturing Company (hereinafter for convenience sometimes called the Alabama and Georgia Company) was chartered by special act of the state of Alabama on February 7, 1866 (Rec. p. 531). On March 12, 1866, the same individuals, as incorporators, were chartered under the same name and for the same purposes by the state of Georgia (Rec. p. 529). This corporation acquired and for many years operated a manufacturing plant partly in Alabama and partly in Georgia.

By deed of trust dated January 2, 1884, this corporation mortgaged all its property to three trustees to secure an issue of bonds (Rec. p. 525). Subsequently the Huguley Manufacturing Company (hereinafter for convenience sometimes called the Huguley Company) purchased and acquired all the property in question and at the beginning of the foreclosure suit hereafter referred to was the owner of the property subject to the mortgage (Rec. p. 492).

Default was made in the payment of the interest on the mortgage bonds, and on January 20, 1891, one of the three trustees under the mortgage filed a bill of complaint in the Circuit Court for the Northern District of Georgia against the Alabama and Georgia Company and the Huguley Company, both described as corporations organized under the laws of Georgia, joining as a defendant another of the trustees who was interested in the Huguley Company adversely to the bondholders (Rec. p. 1). The third trustee was then dead. This bill sought a foreclosure of the mortgage. The defendant corporations duly appeared and filed an answer admitting the facts alleged as to their incorporation and citizenship (Rec. p. 14). A decree of foreclosure was entered (Rec. p. 130), a sale was ordered and made, and the property was purchased in behalf of the bondholders and conveyed to the Galeton Cotton Mills (Rec. pp. 149, 313).

The Alabama and Georgia Company and the Huguley Company appealed from this decree to the Circuit Court of Appeals (Rec. p. 154), and the decree was reversed (Rec. p. 321) on the ground that part of the bonds were not due and the court had erroneously ordered a sale unless all were paid. 56 Fed. Rep. 690. The Huguley Company thereupon petitioned (Rec. p. 158) for restitution of the property, alleging ownership thereof subject to the mortgage. Restitution was ordered upon condition (Rec. p. 327), but the condition was not complied with. An account of the amount due on the bonds was then ordered and taken by a master and on confirmation of his report a new decree of foreclosure was entered (Rec. p. 356). From this decree an appeal was taken (Rec. p. 362); the decree was affirmed by the Circuit Court of Appeals on February 25, 1895 (Rec. p. 375), and a second sale of the property was ordered (Rec. p. 383). An account of the rents and profits was ordered before a master (Rec. p. 385). The Huguley Company petitioned for a postponement of the sale pending the accounting (Rec. p. 386); but the postponement of the sale was refused (Rec. p. 389).

A second sale of the property at foreclosure was thereupon had on May 5, 1896, and the property was purchased in behalf of a majority of the bondholders (Rec. p. 390). The sale was confirmed on June 20, 1896, upon petition of the purchaser opposed by the Huguley Company (Rec. pp. 391–396), but no conveyance was made at that time.

On October 27, 1897, the master filed his report as to the rents and profits, to which both parties concerned excepted. On February 28, 1898, the court entered a decree substantially confirming the master's report (Rec. p. 425). Counsel for the Huguley Company then applied to have their fees paid from the proceeds of the sale (Rec. p. 426); the Huguley Company objected to the applica-

tion of the rents and profits received during the time of possession under the first sale and prior to the second sale in reduction of the mortgage debt, on the ground that it was owner of the property and was not liable for the mortgage debt, and asked to have the balance due on the mortgage debt ascertained. The applications were denied (Rec. p. 436).

On September 22, 1898, the purchaser petitioned for a deed (Rec. p. 440). The Huguley Company opposed this petition (Rec. p. 442).

On October 15, 1898, a decree for a conveyance was entered (Rec. p. 445), the Huguley Company moved to set the decree aside (Rec. p. 448), this motion was denied (Rec. p. 451), and the property was conveyed to the petitioner, and all the purchase money was paid into court.

The Huguley Company, William T. Huguley and the Alabama and Georgia Company thereupon again appealed to the Circuit Court of Appeals (Rec. p. 452), assigning as error among other things the application of rents and profits alleged to belong to the Huguley Company in reduction of the mortgage debt (XVIII-XXI Rec. p. 459). None of the fifty-six assignments of error (Rec. pp. 453–470) contains any suggestion of lack of jurisdiction on the part of the court, over the parties or the subject matter, or of lack of power to make an effectual sale.

This appeal was unsuccessful. On May 16, 1899, the Circuit Court of Appeals affirmed the decrees appealed from in all respects. 94 Fed. Rep. 269. Thereupon the Huguley Company filed a petition in this court for a writ of *certiorari* to review the decision of the Circuit Court of Appeals. On October 30, 1901, the petition was denied. 175 U. S. 726. The Huguley Company then claimed an appeal to this court from the decision of the Circuit Court of Appeals. This appeal was on February 24, 1902, dismissed for want of jurisdiction. 184 U. S. 290.

While the petition for *certiorari* and the appeal to this court above referred to were still pending, the appellees on May 2, 1901, filed a bill in the Chancery Court of Alabama against the present appellant and others, alleging in substance that the Alabama and Georgia Company plaintiff in that suit and the Huguley Company plaintiff in that suit was each a corporation organized under the laws of Alabama; that the corporations thus purporting to bring that suit were not parties to the original foreclosure suit, that all of the mortgaged property was in Alabama, and that the proceedings in the original foreclosure suit were invalid for want of jurisdiction and for want of power to decree a sale of the property. The bill sought to establish a right to redeem the mortgaged property and an account of rents and profits. (Rec. p. 486.)

This bill admitted (paragraph second, Rec. 487) that "The Alabama and Georgia Manufacturing Company" (not describing it further) executed the mortgage dated January 2, 1884, on which the foreclosure suit was founded, covering the lands redemption of which was sought. The bill admitted (paragraph fourth, Rec. pp. 487–490) that Robinson the plaintiff in the foreclosure suit brought that suit, that an "Alabama and Georgia Manufacturing Company alleged to be a corporation organized under the laws of Georgia only, and said Huguley Manufacturing Company" were parties defendant to that suit. The bill proceeded to allege that the Alabama and Georgia Company was also incorporated in Alabama, that the Huguley Company was incorporated only in Alabama, and that all of the land was situated in Alabama, an allegation inconsistent with the description in the first paragraph of the bill and in the mortgage, in each of which a part of the land was described as "being in the twentieth (20) district of Harris County, Georgia." The bill recited part of the proceedings in the foreclosure suit and denied the

validity of the foreclosure and sale on the ground that the corporations organized in Alabama were not before the court, and if they had been would have ousted the jurisdiction since the plaintiff was a citizen of Alabama, and on the ground that the Circuit Court for the Northern District of Georgia could not order a foreclosure and sale of land situated in Alabama. The bill renewed the contention made by the Huguley Company in the foreclosure suit, that the rents and profits greatly exceeded the amount as reported by the master, and alleged specifically that the plaintiff the Huguley Company was the owner subject to the mortgage of the mortgaged property (Rec. p. 492). The prayer of this bill was for a decree establishing the right of "your orators as mortgagors" to redeem, and establishing that "said equity of redemption has never been cut off by any of the said judicial proceedings aforesaid" (Rec. pp. 492, 493) for an account and redemption and the appointment of a receiver *pendente lite*.

To this bill the present appellant and the other respondents therein filed an answer, demurrer, plea and motion to dismiss (Rec. p. 510), and on June 10, 1901, this appellant filed in the Circuit Court for the Northern District of Georgia an ancillary bill against the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company and J. M. Chilton and Welles, Bennett and Welles, their attorneys (Rec. p. 473). A subpœna and order to show cause why an injunction should not be granted were ordered and a temporary restraining order against further prosecution of the suit in Alabama (Rec. p. 500).

The ancillary bill filed by this appellant alleged in substance that the Alabama and Georgia Company and the Huguley Company were both corporations organized under the laws of Georgia, but both claimed to be also

organized under the laws of Alabama; that if either was organized in Alabama it had no place of business there, and that the only officers, directors or stockholders of each were the officers, directors and stockholders which it had as organized in Georgia. The bill set forth the proceedings in the foreclosure suit, ending with the appeal taken by the Huguley Company to this court, then still pending, and referred to the record in the foreclosure suit making it a part of the bill (Rec. p. 478). The bill further set forth the filing of the bill in the Alabama court impeaching the foreclosure decree and all other proceedings in that suit, referring to and making a part of the bill (Rec. p. 478) a copy annexed of the bill in the Alabama court. (Rec. p. 486.) The bill prayed for an injunction restraining the Alabama and Georgia Company and the Huguley Company and their attorneys joined as respondents, from further prosecuting their suit in Alabama.

On June 21, 1901, an "Answer to the Bill and Response to the Rule to Show Cause" was filed by the "Alabama & Georgia Manufacturing Co. and the Huguley Manufacturing Co., each a corporation under the laws of Alabama" and by the attorneys joined as respondents.

This answer (Rec. p. 505) in substance alleged that the Alabama and Georgia Company was incorporated in both Alabama and Georgia, and the Huguley Company in Alabama only, and that the Alabama and Georgia Company by its dual incorporation constituted two distinct entities of which only the Georgia Company was a party to the foreclosure suit. The respondents insisted that the two Alabama corporations plaintiffs in the suit in Alabama were not parties to the foreclosure suit, and that if they were the decree was invalid because in that event the plaintiff and two of the defendants in that suit were citizens of the same state and the court had no jurisdiction. The answer further denied that the bill was ancillary and

that any foreclosure suit was pending in the Circuit Court, and on this ground denied the jurisdiction of the court. The answer also set up Section 720 of the Revised Statutes of the United States as a bar to the bill, alleged that by appearing in the Alabama suit and filing an answer the defendants therein had lost their right to bring this bill, again alleged that the plaintiff in the foreclosure suit and the Huguley Company were citizens of the same state so that the court in that suit had no jurisdiction, alleged that the Georgia charter of the Alabama and Georgia Company expired by legal limitation before the foreclosure sale was made, and denied the jurisdiction of the court to foreclose the mortgage if all or any part of the land mortgaged was in Alabama. The answer set out as an exhibit the answer filed in the Alabama suit (Rec. p. 510).

The Huguley Company and the Alabama and Georgia Company filed a petition in this court for a writ of prohibition to prevent the Circuit Court from entertaining jurisdiction of the suit. This petition was denied on February 24, 1902. *In re Huguley Mfg. Co.*, 184 U. S. 297.

On October 8, 1901, an injunction was ordered as prayed for, to remain in force until further order of the court (Rec. p. 538). On June 19, 1902, the plaintiff in the present suit moved to strike the answer from the files as evasive and no answer (Rec. p. 538). No action apparently was taken on that motion. On September 29, 1902, the case was "submitted upon the bill and proceedings in this cause ancillary to the proceedings in the cause lately pending in this court of J. J. Robinson, as trustee, etc., against Alabama & Georgia Manufacturing Company, *et al.*, and upon the record in said last named cause" (Rec. p. 539) and the injunction was made perpetual.

From the final decree granting a perpetual injunction

the Alabama and Georgia Company and the Huguley Company appealed, the other defendants refusing to join (Rec. pp. 540-542). The errors assigned were failure to dismiss for lack of jurisdiction of the subject matter and of the parties, on the grounds that there was not the necessary diversity of citizenship, that the bill was not ancillary, that the foreclosure decree was not binding on the Alabama and Georgia Company as an Alabama corporation, that there was no jurisdiction over the persons of the defendants, that the suit was local and could not be brought outside of Alabama, that Revised Statutes, Section 720, prohibited the suit, that there was not sufficient evidence to support the decree, that there was lack of equity, that the remedy was misconceived, that the foreclosure sale was inoperative in Alabama, that no decree had been rendered in the foreclosure suit against the Huguley Company (apparently on the theory that if wrongly described as organized in Georgia it was not a party to that suit), that an injunction should not be granted against an accounting, that the controversy should be left to the Alabama court, and again that the sale was a nullity and the court without jurisdiction in the foreclosure suit (Rec. pp. 542-546).

On January 12, 1904, the Circuit Court of Appeals, Judge Pardee dissenting, reversed the decision of the Circuit Court and ordered the bill dismissed for want of jurisdiction of the subject matter, apparently on the ground that the corporations plaintiffs in the Alabama suit were for all purposes distinct from and independent of the corporations defendants in the foreclosure suit, and not affected by the proceedings in the latter suit (Rec. p. 551). An application for a rehearing was denied (Rec. p. 573).

On March 22, 1904, upon petition of the appellant, a writ of *certiorari* was issued to the Circuit Court of Appeals

and the record was thereupon returned into this court and filed on April 13, 1904.

The proceedings in this litigation up to the present time, so far as reported, with some unreported opinions of the Circuit Court have been as follows:

Robinson v. *Alabama & G. Mfg. Co.*, 48 Fed. Rep. 12 (1891). Demurrer to original foreclosure bill overruled. Lamar and Newman, JJ.

Ibid., Record, p. 133 (1892). Decree adjudging default and ordering foreclosure. Newman, J.

Ibid., 51 Fed. Rep. 268 (1892). Demurrer to application for allowance of counsel fees sustained. Newman, J.

Alabama & G. Mfg. Co. v. *Robinson*, 56 Fed. Rep. 690 (1893). First decree for foreclosure and sale reversed. Pardee, McCormick, and Toulmin, JJ.

Robinson v. *Alabama & G. Mfg. Co.*, 67 Fed. Rep. 189 (1894). Decree for restitution and for a second foreclosure. Newman, J.

Ibid., Record, p. 354 (1895). Decree ordering a resale of the property. Newman, J.

Alabama & G. Mfg. Co. v. *Robinson*, 72 Fed. Rep. 708

(1896). Decree as to restitution and for second foreclosure affirmed. Pardee, McCormick, and Boarman, JJ.

Robinson v. *Alabama & G. Mfg. Co.*, 89 Fed. Rep. 218 (1898). Decree on account for rents and profits and application thereof to deficiency in proceeds of mortgage. Newman, J.

Ibid., Record, p. 427 (1898). Decree on application to tax costs and apply rents and profits to mortgage debt. Newman, J.

Ibid., Record, p. 435 (1898). Decree on manner of applying rents and profits to mortgage debt. Newman, J.

Huguley Mfg. Co. v. *Galeton Cotton Mills*, 94 Fed. Rep. 269 (1899). Decree as to rents and profits, etc., affirmed. Pardee, McCormick, and Shelby, JJ.

Ibid., 175 U. S. 726 (1899). Petition for writ of *certiorari* denied.

Riverdale Cotton Mills v. *Alabama & G. Mfg. Co.*, 111 Fed. Rep. 431 (1901). Preliminary injunction restraining prosecution of suit in Alabama granted. Newman, J.

Huguley Mfg. Co. v. *Galeton Cotton Mills*, 184 U. S. 290 (1902). Appeal from final decree dismissed.

In re The Huguley Mfg. Co., 184 U. S. 297 (1902). Leave to file petition for prohibition against taking jurisdiction of ancillary bill denied.

Alabama & G. Mfg. Co. v. *Riverdale Cotton Mills*, 127 Fed. Rep. 497 (1904). Present bill ordered to be dismissed. McCormick and Shelby, JJ.; Pardee, J., dissenting.

ASSIGNMENT OF ERRORS.

FIRST. The Circuit Court of Appeals erred in ordering the cause to be remanded to the Circuit Court with directions to dismiss the bill.

SECOND. The Circuit Court of Appeals erred in holding that the bill was not ancillary to the foreclosure suit and therefore within the jurisdiction of the Circuit Court.

THIRD. The Circuit Court of Appeals erred in holding that the decree of the Circuit Court was not effectual to foreclose the mortgage as to property in Alabama.

FOURTH. The Circuit Court of Appeals erred in holding that the decree of foreclosure rendered by the Circuit Court was open to the collateral attack made in the Alabama suit.

FIFTH. The Circuit Court of Appeals erred in holding that the Huguley Manufacturing Company, one of the respondents in this suit, was not a party defendant to and bound by the decree in the foreclosure suit.

SIXTH. The Circuit Court of Appeals erred in holding that it was material whether the Alabama and Georgia Manufacturing Company as a corporation of Alabama was bound by the foreclosure decree or not.

SEVENTH. The Circuit Court of Appeals erred in holding that the Alabama and Georgia Manufacturing Company as a corporation of Alabama was not a party defendant to and bound by the decree in the foreclosure suit.

SYNOPSIS OF ARGUMENT.

FIRST.

THE PRESENT SUIT IS ANCILLARY TO THE FORECLOSURE SUIT.

I.

A proceeding to prevent a decree from being defeated is ancillary to the proceeding in which the decree was rendered.

Dunn v. *Clarke*, 8 Peters 1.
Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609.
Johnson v. *Christian*, 125 U. S. 642.
Carey v. *Houston & Texas Central Railway Co.*, 161 U. S. 115, 130.
Root v. *Woolworth*, 150 U. S. 401.
French v. *Hay*, 22 Wall. 250.
Dietzsch v. *Huidekoper*, 103 U. S. 494.

II.

The purchaser at a judicial sale may bring such a suit, to protect the title acquired.

Root v. *Woolworth*, 150 U. S. 401.
Blossom v. *Railroad Co.*, 1 Wall. 655.
Kneeland v. *American Loan & Trust Co.*, 136 U. S. 89.
Aderholt v. *Henry*, 82 Ala. 541.

Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609.
Julian v. *Central Trust Co.*, 193 U. S. 93, 112.

III.

The present suit was ancillary within the foregoing principles.

1 Bates on Federal Equity Procedure, Sect. 97.
Julian v. *Central Trust Co.*, 193 U. S. 93, 113, 114.
Root v. *Woolworth*, 150 U. S. 401.
Haralson v. *George's Executor*, 56 Ala. 295.

SECOND.

AS THE PRESENT SUIT WAS ANCILLARY TO THE FORECLOSURE SUIT THE CIRCUIT COURT PROPERLY TOOK JURISDICTION.

I.

The Circuit Court of the United States has jurisdiction without regard to citizenship or other grounds of any proceeding ancillary to a suit before it.

Pacific R.R. of Mo. v. *Mo. Pac. Ry. Co.*, 111 U. S. 505, 522.
Dunn v. *Clarke*, 8 Peters 1.

Krippendorf v. *Hyde*, 110 U. S. 276.
Labette County Commissioners v. *Moulton*, 112 U. S. 217.
Dewey v. *West Fairmont G. C. Co.*, 123 U. S. 329.
Johnson v. *Christian*, 125 U. S. 642.
Root v. *Woolworth*, 150 U. S. 401.
White v. *Ewing*, 159 U. S. 36.
Carey v. *Houston & T. C. Ry. Co.*, 161 U. S. 115.
Julian v. *Central Trust Co.*, 193 U. S. 93.

II.

Section 720 of the Revised Statutes was no bar to the maintenance of the suit.

French v. *Hay*, 22 Wall. 250.
Dietzsch v. *Huidekoper*, 103 U. S. 494.
Moran v. *Sturges*, 154 U. S. 256, 269 et seq.
Julian v. *Central Trust Co.*, 193 U. S. 93.
Bowdoin College v. *Merritt*, 59 Fed. Rep. 6.

See also:

Sharon v. *Terry*, 36 Fed. Rep. 337, 365, per Field, J.
State Trust Co. v. *Kansas City P. & G. R.R. Co.*, 110 Fed. Rep. 10.
Stewart v. *Wisconsin Central Ry. Co.*, 117 Fed. Rep. 782.

THIRD.

THE DECREE OF THE CIRCUIT COURT IN THE FORECLOSURE SUIT WAS EFFECTUAL TO FORECLOSE THE MORTGAGE WHEREVER THE LAND WAS SITUATED.

I.

A suit to foreclose a mortgage is transitory.

Phelps v. *McDonald*, 99 U. S. 298, 308.
Toller v. *Carteret*, 2 Vern. 494.
Penn. v. *Lord Baltimore*, 1 Ves. Sr. 444.
Paget v. *Ede*, L. R. 18 Eq. 118.
Mead v. *N. Y. H. & N. R.R. Co.*, 45 Conn. 199, 223.
Reed v. *Reed*, 75 Me. 264.
Eaton v. *McCall*, 86 Me. 346.
Pingree v. *Coffin*, 12 Gray 288.
Union Trust Co. v. *Olmsted*, 102 N. Y. 729.

II.

The Circuit Court had power effectually to decree the foreclosure of a mortgage covering land outside the district.

Muller v. *Dows*, 94 U. S. 444.
Boston Safe Deposit & Trust Co. v. *Bankers & M. Tel Co.*, 36 Fed. Rep. 288.
Ford v. *Delta & Pine Land Co.*, 43 Fed. Rep. 181, 189.
Woodbury v. *Allegheny & K. R.R. Co.*, 72 Fed. Rep. 371, 375.

International B. & T. Co. v. *Holland Trust Co.*, 81 Fed. Rep. 422.
Central Trust Co. v. *Wabash, St. L. & P. Ry. Co.*, 29 Fed. Rep. 618.
Farmers L. & T. Co. v. *Chicago & Atlantic Ry. Co.*, 27 Fed. Rep. 146, 148.

III.

It is immaterial that the decree of foreclosure did not require a confirmatory deed from the mortgagor or owner of the equity of redemption.

See *Muller* v. *Dows*, 94 U. S. 444
Root v. *Woolworth*, 150 U. S. 401.

FOURTH.

THE VALIDITY OF THE FINAL DECREE OF THE CIRCUIT COURT IN THE FORECLOSURE SUIT WAS NOT OPEN TO THE COLLATERAL ATTACK MADE IN THE ALABAMA SUIT.

I.

A final decree of the Circuit Court of the United States cannot be collaterally attacked on the ground that the diversity of citizenship necessary to give jurisdiction was lacking.

M'Cormick v. *Sullivani*, 10 Wheat. 192.
Ex parte Tobias Watkins, 3 Peters 193, 207.

Cutler v. *Huston*, 158 U. S. 423.
Des Moines N. & R.R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Dowell v. *Applegate*, 152 U. S. 327.
Evers v. *Watson*, 156 U. S. 527.
Lacassagne v. *Chapuis*, 144 U. S. 119.

II.

The jurisdiction of the Circuit Court could not be attacked on the ground that no part of the land was situated in Georgia.

Ritchie v. *McMullen*, 159 U. S. 242.
Rose v. *Himely*, 4 Cranch 241, 269.
Scott v. *McNeal*, 154 U. S. 34.
Thompson v. *Whitman*, 18 Wall. 457.
United States v. *Arredondo*, 6 Peters 691, 709.
Des Moines N. & R.R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
In re Sawyer, 124 U. S. 200, 220, 221.
Dowell v. *Applegate*, 152 U. S. 327, 340.
Mellen v. *Moline Iron Works*, 131 U. S. 352, 367.
Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380.

FIFTH.

THE HUGULEY COMPANY WAS BOUND BY THE DECREE IN THE FORECLOSURE SUIT WHETHER ORGANIZED UNDER THE LAWS OF GEORGIA OR NOT.

I.

The Huguley Company now before the court is the same corporation that was a party to the foreclosure suit.

II.

A final decree against a corporation cannot be impeached for an erroneous allegation admitted by the defendant as to the state under the laws of which the corporation exists.

Black on Judgments, Sect. 213.
The Lafayette Insurance Co. v. *French,* 18 How. 404.
Guinard v. *Heysinger,* 15 Ill. 288.
Pond v. *Ennis,* 69 Ill. 341.
Hoffield v. *Board of Education,* 33 Kan. 644.
Cleaveland v. *Boston Five Cents Sav. Bk.,* 129 Mass. 27.
National Bank v. *Distilling Co.,* 41 W. Va. 530.
Smith v. *Bowker,* 1 Mass. 76.
United States National Bank v. *Venner,* 172 Mass. 449.
Washington Co. Nat. Bk. v. *Lee,* 112 Mass. 521.
Thatcher v. *West River Nat. Bk.,* 19 Mich. 196.

SIXTH.

AS THE FORECLOSURE DECREE WAS BINDING ON THE HUGULEY COMPANY THE PRESENT SUIT IS MAINTAINABLE EVEN THOUGH THAT DECREE WAS INVALID AGAINST THE ALABAMA AND GEORGIA COMPANY AS A CORPORATION OF ALABAMA.

I.

The Huguley Manufacturing Company at the time of the foreclosure was the owner of the equity of redemption.

II.

The Alabama and Georgia Company was not a necessary party to a foreclosure of the mortgage.

Jones on Mortgages, 6th Ed., Sec. 1404.
Story on Equity Pleadings, 10th Ed., Sec. 197.
Bigelow v. *Bush*, 6 Paige 343.
Wilkinson v. *May*, 69 Ala. 33.
Thomas v. *Jones*, 84 Ala. 302.
Boutwell v. *Steiner*, 84 Ala. 307.
Belloc v. *Rogers*, 9 Cal. 123.
Gutzeit v. *Pennie*, 98 Cal. 327.
Swift v. *Edson*, 5 Conn. 531.
Stevens v. *Campbell*, 21 Ind. 471.
Davis v. *Hardy*, 76 Ind. 272.
West v. *Miller*, 125 Ind. 70.
Johnson v. *Monell*, 13 Iowa 300.
Johnson v. *Foster*, 68 Iowa 140.
Miller v. *Thompson*, 34 Mich. 10.

Osborn v. *Crump*, 57 Miss. 622. Semble.
Chester v. *King*, 2 N. J. Eq. 405.
Root v. *Wright*, 21 Hun. 344.
Miner v. *Smith*, 53 Vt. 551.
Delaplaine v. *Lewis*, 19 Wis. 476.
Cf. *Ayres* v. *Wiswall*, 112 U. S. 187.

III.

It is immaterial that the Alabama and Georgia Company was joined as a defendant in the foreclosure suit.

See *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380.

IV.

The Huguley Manufacturing Company is the only real party in interest in the suit in Alabama and in the present suit

See *Tubb* v. *Fort*, 58 Ala. 277.

V.

The suit is, therefore, maintainable against the Huguley Company irrespective of the Alabama and Georgia Company.

See *Kitchens* v. *Hutchins*, 44 Ga. 620.
Newburg v. *Munshower*, 29 Oh. St. 617.

SEVENTH.

THE ALABAMA AND GEORGIA COMPANY, ONE OF THE APPELLEES IN THIS SUIT, WAS ALSO IN FACT BOUND BY THE DECREE IN THE FORECLOSURE SUIT.

I.

A corporation organized under the laws of two states is a single corporation as to its acts, obligations and liabilities.

Graham v. *Boston, Hartford & Erie Railroad Co.*, 118 U. S. 161.
Nashua & L. R.R. Co. v. *Boston & L. R.R. Co.*, 136 U. S. 356.
Railroad Co. v. *Vance*, 96 U. S. 450.
Muller v. *Dows*, 94 U. S. 444.
Uphoff v. *C. St. L. & N. O. R.R. Co.*, 5 Fed. Rep. 545.
Horne v. *B. & M. R.R. Co.*, 18 Fed. Rep. 50.
Nashua & L. R.R. Co. v. *Boston & L. R.R. Co.*, 19 Fed. Rep. 804.
Burger v. *Grand Rapids & I. R.R. Co.*, 22 Fed. Rep. 561, 564.
Union Trust Co. v. *Rochester & P. R.R. Co.*, 29 Fed. Rep. 609.
Cf. *Louisville N. A. & C. Ry. Co.* v. *Louisville Trust Co.*, 174 U. S. 552.
Morawetz on Private Corporations, 2d Ed., Sec's 995, 996.
Railroad Co. v. *Harris*, 12 Wall. 65.

Cf. *St. Louis & San Francisco Ry. Co.* v. *James*, 161 U. S. 545.

II.

The cases as to the jurisdiction of the Federal Court depend upon a wholly distinct question from that here under consideration.

Cf. *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black 286.

Corporations are recognized outside of the state granting the charter.

Railroad Co. v. *Harris*, 12 Wall. 65, 81–83.
Cowell v. *Springs Co.*, 100 U. S. 55.
Christian Union v. *Yount*, 101 U. S. 352.

Cases of corporations organized in one state licensed to do business in another

Railroad Co. v. *Harris*, 12 Wall. 65.
Goodlett v. *Louisville & N. R.R. Co.*, 122 U. S. 391.
Martin's Adm. v. *B. & O. R.R. Co.*, 151 U. S. 673.
St. L. & St. F. Ry. Co. v. *James*, 161 U. S. 545.
St. J. & Gr. I. R.R. Co. v. *Steele*, 167 U. S. 659.
Southern Ry. Co. v. *Allison*, 190 U. S. 326.

are to be distinguished from cases of dual incorporation.

Railway Co. v. *Whitton*, 13 Wall. 270.
Memphis & C. R.R. Co. v. *Alabama*, 107 U. S. 581.

Pennsylvania R.R. Co. v. *St. Louis, A. & T. H. R.R. Co.*, 118 U. S. 290.

Cf. *Louisville N. A. & C. Ry. Co.* v. *Louisville Trust Co.*, 174 U. S. 552.

Nashua & L. R.R. Co. v. *Boston & L. R.R. Co.*, 136 U. S. 356.

III.

It is immaterial whether the charter of the Alabama and Georgia Manufacturing Company expired before the foreclosure decree was rendered or not.

Greeley v. *Smith*, 3 Story 657, 658.

National Bank of Selma v. *Colby*, 21 Wall. 609.

New Orleans v. *Gaines's Administrator*, 138 U. S. 595.

Reid v. *Holmes*, 127 Mass. 326.

See also:

Bridges v. *Smyth*, 8 Bing. 29.

Yaple v. *Titus*, 41 Pa. St. 195.

Powell v. *Washington*, 15 Ala. 803.

EIGHTH.

NO EVIDENCE WAS NECESSARY TO JUSTIFY THE COURT IN ENTERING THE DECREE.

I.

No material issue of fact was raised by the answer.

Analysis of answer.

The appearance and pleading of the present appellant in the Alabama suit is immaterial.

French v. *Hay*, 22 Wall. 250.
Dietzsch v. *Huidekoper*, 103 U. S. 494.

II.

The decree could properly be entered on a hearing upon bill and answer.

In re Sanford Fork and Tool Company, 160 U. S. 247.
Dillon v. *Barnard*, 21 Wall. 430, 437.

NINTH.

IF AND SO FAR AS ANY EVIDENCE WAS REQUIRED THERE WAS SUFFICIENT BEFORE THE COURT TO UPHOLD THE DECREE.

I.

All the facts alleged in the bill necessary to uphold the decree, not expressly admitted, were contained in the record of the foreclosure suit.

II.

The record in the foreclosure suit before the court was competent evidence.

See *Blossom* v. *Railroad Co.*, 1 Wall. 655.
Kneeland v. *Am. L. & T. Co.*, 136 U. S. 89.
Central Nat. Bk. v. *Hazard*, 30 Fed. Rep. 484.
Gunn v. *Wades*, 62 Ga. 20.
Shirley v. *Fearne*, 33 Miss. 653.

III.

If the answer showed any affirmative defence no evidence was necessary to defeat it.

Clarke v. *White*, 12 Pet. 178, 190.
Seitz v. *Mitchell*, 94 U. S. 580.
Farley v. *Kitson*, 120 U. S. 303, 317.

See also:

Gordon v. *Bell*, 50 Ala. 213.

TENTH.

THE BILL STATED A CLEAR CASE OF JURISDICTION IN EQUITY.

Dunn v. *Clarke*, 8 Peter 1.
French v. *Hay*, 22 Wall. 250.
Dietzsch v. *Huidekoper*, 103 U. S. 494.
Root v. *Woolworth*, 150 U. S. 401.
Julian v. *Central Tr. Co.*, 193 U. S. 93.

ELEVENTH.

IF THERE WERE ANY IRREGULARITIES OF PROCEDURE THEY WERE WAIVED.

There was an answer. If not it is too late to object. The lack of a replication was waived.

Reynolds v. *Crawfordsville Bank*, 112 U. S. 405.
National Bank v. *Insurance Co.*, 104 U. S. 54.
Clements v. *Moore*, 6 Wall. 299.
Fretz v. *Stover*, 22 Wall. 198.

TWELFTH.

THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF GEORGIA HAD JURISDICTION OVER THE PERSONS OF THE APPELLEES.

I.

Appearing and proceeding otherwise than for the sole purpose of objecting to the sufficiency of the service is a waiver of any defect of service.

Cooper v. *Reynolds*, 10 Wall. 308, 316.
Rothschild v. *Knight*, 176 Mass. 48, 55.
Pollard v. *Dwight*, 4 Cranch 421, 428.
Loomis v. *Wadhams*, 8 Gray 557.
Brown v. *Webber*, 6 Cush. 560, 564.
Voorhees v. *The Bank of the United States*, 10 Peters 449, 473.
Toland v. *Sprague*, 12 Peters 300, 331.
Harkness v. *Hyde*, 98 U. S. 476.

Wabash Western Railway v. *Brow*, 164 U. S. 271, 278.
Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98.
St. Louis & San Francisco Ry. Co. v. *McBride*, 141 U. S. 127.
Cf. *Southern Pacific Company* v. *Denton*, 146 U. S. 202.

II.

The appellees appeared and proceeded in this suit without raising any objection to the sufficiency of the service.

THIRTEENTH.

THE COURT COULD NOT PROPERLY DISMISS THE BILL FOR WANT OF SERVICE.

I.

The case was one for substituted service.

Dunn v. *Clarke*, 8 Peters 1.
Webb v. *Barnwall*, 116 U. S. 193.
Pike v. *Gregory*, 94 Fed. Rep. 373.
Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609, 633.

II.

If there was any defect the remedy was not to dismiss the bill, but to set aside the service.

There was a service of process.

See Georgia Code, Section 1899.

City Fire Insurance Co. v. *Carrugi*, 41 Ga. 660.
Equitable Life Ass'n v. *Gammon*, 119 Ga. 271.
Conn. Mut. Life Ins. Co. v. *Spratley*, 172 U. S. 602.

If objected to, the court could have ordered further service.

Bartlett v. *Sultan of Turkey*, 19 Fed. Rep. 346.

If insufficient it should at most be set aside.

Harkness v. *Hyde*, 98 U. S. 476.
Goldey v. *The Morning News*, 156 U. S. 518.

ARGUMENT.

FIRST.

THE PRESENT SUIT IS ANCILLARY TO THE FORECLOSURE SUIT.

I.

A proceeding to prevent a decree from being defeated is ancillary to the proceeding in which the decree was rendered.

Any suit brought to protect or give effect to a judgment or decree already rendered by the same court in a suit between the same parties or their privies, or growing out of such former suit, is an ancillary proceeding.

In *Dunn* v. *Clarke*, 8 Peters 1, a bill was brought by the defendants in an action of ejectment in which judgment had been recovered, to restrain enforcement of the judgment. This court held that the Circuit Court had jurisdiction without regard to the citizenship of the parties, because the bill was ancillary to the ejectment.

In *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, a bill was brought by one of the defendants in a foreclosure suit against the purchaser at the sale to determine the rights to certain property alleged in the bill not to have been covered by the mortgage. This court upheld the jurisdiction on the ground that the bill was ancillary, because the rights of the parties depended on the construction placed upon the acts of the court in the foreclosure suit.

Mr. Justice Miller delivering the opinion of the court said as to what constituted an ancillary proceeding:

"But we think that the question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law. The case before us is analogous." p. 633.

In *Johnson* v. *Christian*, 125 U. S. 642, this court again held that a bill by a defendant at law to restrain enforcement of the judgment was ancillary so that jurisdiction did not depend on the citizenship of the parties.

In a later case this court said:

"It is very well settled that a bill in equity by a corporation or the stockholders of a corporation in the Circuit Court to set aside a final decree of that court against the corporation in a foreclosure suit upon the ground that such a decree was obtained by collusion and fraud, and the court had no jurisdiction to make it, is an ancillary suit and a continuation of the main suit so far as the jurisdiction of the Circuit Court as a court of the United States is concerned." *Carey* v. *Houston & Texas Central Railway Company*, 161 U. S. 115, 130.

For the same reasons a suit to enforce a judgment or decree or to protect a title acquired under a judgment or decree is ancillary to the original proceeding. Such a suit grows out of and is a continuation of the original suit in the same sense as a suit to impeach the judgment or decree or title acquired under the judgment or decree in the original suit. The jurisdiction of the court having once attached to the original subject matter, further proceedings necessary to give full effect to its jurisdiction, whether by way of preventing an injustice or of fully administering justice, are ancillary.

In *Root* v. *Woolworth*, 150 U. S. 401, the plaintiff filed his bill in the Circuit Court to restrain the defendant from asserting a title which many years before in a suit brought in the same court by the plaintiff's predecessor in estate against the defendant had been set up by the defendant and adjudged invalid. This court held that the bill could be maintained, although both parties were citizens of Nebraska, and although it was brought to recover real estate of which the plaintiff was not in possession, because it was ancillary to the former suit of which the Circuit Court had jurisdiction. Mr. Justice Jackson, delivering the opinion of the court, said:

> "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject-matter and the parties are the same in both proceedings." 150 U. S. 410, 411.

And again,

> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties, is well settled." 150 U. S. 411, 412.

In *French* v. *Hay*, 22 Wall. 250, a suit was brought in a state court in Virginia in which a decree was entered for the plaintiff who at once brought suit thereon in a state court in Pennsylvania. The defendant in these suits then removed the original suit to the Circuit Court of the United States and filed a bill in that court to restrain the further prosecution of the action in Pennsylvania. This court held the last suit was ancillary to the suit removed to the Circuit Court and could be maintained.

In *Dietzsch* v. *Huidekoper*, 103 U. S. 494, a state court retained jurisdiction of an action of replevin removed to the Circuit Court of the United States, and upon final judgment for the defendant in the state court an action was brought by him against the plaintiff on the replevin bond. The plaintiff in replevin thereupon brought a bill in the Circuit Court to restrain the action on the replevin bond. This court held that the bill could be maintained, and said:

> "The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal Court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them." 103 U. S. 497.

II.

The purchaser at a judicial sale may bring such a suit, to protect the title acquired.

It is not necessary that one bringing an ancillary suit should be a party to the original litigation in which the judgment or decree was rendered. If he is the privy in

estate of a party, or derives the title or right which he seeks to protect from the decree, it is sufficient to give him a standing before the court because the suit is then as truly a continuation of the original litigation as if brought by the original party.

As to the right of one not a party to the original suit to maintain such a proceeding, this court said:

> "Under this principle Morton could undoubtedly have brought the bill to carry into effect the decree rendered in his favor against Root, and it is equally clear that his assignee, or privy in estate, has a right to the same relief that Morton could have asserted." *Root* v. *Woolworth*, 150 U. S. 401, 411.

The case of a purchaser at a judicial sale is much stronger. His title is derived from the decree itself. While not a party originally to the litigation he becomes for many purposes a party to the suit. He may, if the sale is not completed, petition for a completion and appeal from an order denying his petition.

Blossom v. *Railroad Co.*, 1 Wall. 655.

> "A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to." 1 Wall. 656.

This statement of the principles governing the rights of such persons was approved in *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89.

Of the position of such a purchaser the Supreme Court of Alabama has said:

> "The purchaser becomes a *quasi* party to the cause in which the decree is rendered, subject to such orders as the court may make, and may move for confirmation, or resist an application by any party to have the sale set aside." *Aderholt* v. *Henry*, 82 Ala. 541, 542.

The purchaser's claims under the decree can be attacked by an ancillary proceeding to which he may properly be made a party.

Minnesota Co. v. *St. Paul Co.*, 2 Wall. 609.

A fortiori if the decree under which the purchaser holds is collaterally attacked in another court, he must have the same right to invoke the assistance of the court which entered the decree as if he had originally been a party. So far as that decree and the proceedings subsequent to it are concerned, he is a party, and as he takes the burden of that position so he is entitled to its benefit.

In the present case the appellant was made a party defendant (Rec. p. 492) to the suit in the Alabama chancery court in which it was sought to impeach the final decree rendered by the Circuit Court for the Northern District of Georgia in the foreclosure suit. The present bill was brought solely to prevent the appellees from attacking collaterally in the Alabama court the decree, binding upon them, rendered by the Circuit Court and affirmed by the Circuit Court of Appeals, on which the title of the appellant depends. Every reason that can be advanced in support of the decision in *Root* v. *Woolworth*, 150 U. S. 401, is applicable with added force here. While the appellant was not a party to the foreclosure suit, it takes title under the decree therein, and is in the same privity of estate as a purchaser from a party. If it is a sufficient answer to say, as the appellees have argued, that the rights under the decree could be sufficiently

enforced by producing the record in the Alabama court, that answer would have been equally cogent in *Root* v. *Woolworth*.

In *Julian* v. *Central Trust Co.*, 193 U. S. 93, this court gave full effect to these principles. In that case the Southern Railway Company in 1894 became the purchaser under a foreclosure decree of the Western North Carolina Railroad. In 1897 two suits were begun and judgments recovered against the Western North Carolina Railroad Company for personal injuries suffered long after the foreclosure sale. The Supreme Court of North Carolina held that notwithstanding the foreclosure the property was liable for these judgments recovered against the old corporation on the ground that as the Southern Railway Company was not a domestic corporation it did not acquire a title to the property free from claims subsequently arising against the former owner. Thereupon the Southern Railway Company filed a bill in the Circuit Court of the United States in which the foreclosure decree was entered to restrain any further proceedings to enforce the judgments against the property.

This court held that the Circuit Court had jurisdiction of such a bill as ancillary to the original proceeding, saying:

> "in effect it is sought to annul the order and decree of the Federal court because it has not operated to transfer the title to the purchaser." 193 U. S. 109.
>
> "If the sheriff is allowed to sell the very property conveyed by the Federal decree, such action has the effect to annul and set it aside, because in the view of the state court it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the Federal Court and to render effectual its decree." 193 U. S. 112.

The whole basis of the federal jurisdiction thus maintained was the protection of a purchaser claiming title under a decree of the federal court.

III.

The present suit was ancillary within the foregoing principles.

The doctrine as to what are ancillary proceedings has been summarized by a recent text writer, in a passage approved by this court, as follows:

> "A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes, or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defence of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit." 1 Bates on Federal Equity Procedure, Sect. 97.

Approved in *Julian* v. *Central Trust Co.*, 193 U. S. 93, 113, 114.

The present case falls precisely within this definition. The sole object of the present bill is to establish in the Circuit Court for the Northern District of Georgia the validity of the title derived from a decree of that court, to retain in that court a litigation there begun and conducted to a conclusion. It is in the strictest sense a bill to carry into effect a former decree of the court.

The situation in the present case is precisely the same as in *Julian* v. *Central Trust Co.* The bill filed in the Alabama court was for the express purpose of attacking and in effect annulling the decree of the Circuit Court for the Northern District of Georgia, on the ground that the decree failed to give a good title to the purchaser at the sale. If, as this court decided in the case referred to, a federal court would have jurisdiction to restrain a levy upon the property, because the levy could be justified only on a ground in derogation of its decree, clearly a federal court has jurisdiction to restrain proceedings to recover such a judgment.

Obviously, the bill would be none the less ancillary if at the time it was filed the original suit had finally terminated. The principle on which jurisdiction of ancillary proceedings rests would be singularly futile if the moment a final decree in the original suit was entered the right to maintain ancillary proceedings to protect or give effect to the jurisdiction of the court was lost. In the large class of cases in which the ancillary proceedings are to restrain enforcing a judgment such a restriction would destroy the jurisdiction; and in like manner in those cases in which ancillary proceedings are brought to enforce or give effect to a decree. In *Root* v. *Woolworth*, 150 U. S. 401, the judgment on which the plaintiff's title rested, in aid of which he sought the assistance of the court, had been entered many years before. In *Julian* v. *Central Trust Co.*, 193 U. S. 93, so far as appears the original suit had been finally disposed of.

It is not, however, true, as contended by the appellees in the court below, that when this bill was filed the original foreclosure suit was no longer pending in the Circuit Court. The present bill was filed on June 10, 1901. (Rec. p. 473.) It is a matter of record in this court that an appeal in the foreclosure suit from the final decree affirmed by the Circuit Court of Appeals was then pending in this court and was not disposed of until February 24, 1902. See *Huguley Manufacturing Co.* v. *Galeton Cotton Mills*, 184 U. S. 290.

The necessity from practical considerations of having all the proceedings in one court is obvious. The parties really interested were all before the Circuit Court and subject to its orders. Any proceeding in that court to vacate the sale would constitute with the previous proceedings a single record. An original bill in another jurisdiction would make a new suit, increasing the expense, confusing the records and protracting the litigation.

Haralson v. *George's Executor*, 56 Ala. 295.

Had the appeal to this court, pending when the bill in Alabama was filed, proved successful in any particular so that the cause had been sent back for further proceedings, there would have been presented the extraordinary and unseemly spectacle of a Circuit Court of the United States exercising jurisdiction to foreclose a mortgage and a state court of Alabama exercising jurisdiction for the redemption of the same mortgage.

It has been argued that an ancillary suit could not be maintained while the appeal was pending in this court. It is not clear whether this argument proceeds upon the theory that pending the appeal there is no suit in the Circuit Court in which an ancillary bill can be filed, or on what ground. Aside from the objection that so far as

appears there was no supersedeas upon the appeal to this court, it is clear that the pendency of the appeal cannot oust the jurisdiction of the Circuit Court to protect its jurisdiction and that of this court. The alternative would be a bill filed in this court; for certainly the right to take jurisdiction of an ancillary proceeding existed before the appeal, and certainly it exists after the appeal is disposed of; that there should be an interregnum pending the appeal, during which no federal court can take jurisdiction of ancillary proceedings however urgently required, is inconceivable.

SECOND.

AS THE PRESENT SUIT WAS ANCILLARY TO THE FORECLOSURE SUIT, THE CIRCUIT COURT PROPERLY TOOK JURISDICTION.

I.

The Circuit Court of the United States has jurisdiction without regard to citizenship or other grounds of any proceeding ancillary to a suit before it.

The right of a Circuit Court of the United States to entertain jurisdiction, without regard to citizenship, of proceedings ancillary to a suit already before the court is firmly established.

The jurisdiction over the original suit gives jurisdiction over the ancillary proceedings.

> "The bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the Circuit Court."

Pacific R.R. of Mo. v. *Mo. Pac. Ry. Co.*, 111 U. S. 505, 522.

Such jurisdiction extends to the protection of property involved in the litigation before the court, to preventing the abuse of process of the court, to restraining the enforcement of judgments or decrees, to proceedings for carrying into effect its judgments and decrees, and to all other proceedings necessary to enable the court fully and effectually to administer justice in suits brought before it.

Jurisdiction over such ancillary proceedings is obviously necessary for the satisfactory and efficient action of the Circuit Court and such jurisdiction has accordingly been uniformly upheld by this court.

Dunn v. *Clarke*, 8 Peters 1.
Krippendorf v. *Hyde*, 110 U. S. 276.
Labette County Commissioners v. *Moulton*, 112 U. S. 217.
Dewey v. *West Fairmont G. C. Co.*, 123 U. S. 329.
Johnson v. *Christian*, 125 U. S. 642.
Root v. *Woolworth*, 150 U. S. 401.
White v. *Ewing*, 159 U. S. 36.
Carey v. *Houston & T. C. Ry. Co.*, 161 U. S. 115.
Julian v. *Central Trust Co.*, 193 U. S. 93.

II.

Section 720 of the Revised Statutes was no bar to the maintenance of the suit.

Section 720 of the Revised Statutes of the United States provides that:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This section and the analogous provision of the Judiciary Act of March 2, 1793, C. 22, Section 5, have always been construed as not applicable to cases in which a court of the United States has first acquired jurisdiction, and the injunction is asked for to enable it fully to exercise such jurisdiction. Whenever, therefore, an injunction is asked for by a bill which is ancillary to a suit or controversy of which the federal court first acquired jurisdiction, the issue of the injunction is not within the prohibition of this provision of the Revised Statutes.

In *French* v. *Hay*, 22 Wall. 250, a suit was brought in a state court of Virginia and a decree rendered for the plaintiff. The defendant in that suit then removed the case to the Circuit Court of the United States. Before the removal was actually effected, the plaintiff obtained a transcript of the decree and brought an action on it in Pennsylvania. After the removal the defendant in the Pennsylvania suit filed a bill in the Circuit Court to which he had removed the original suit asking an injunction against the further prosecution of the action in Pennsylvania. A preliminary injunction was granted, which, upon the Circuit Court entering a final decree in the suit first brought, was made permanent.

Mr. Justice Swayne, delivering the opinion of this court, said:

> "The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in state courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision." 22 Wall. 253.

In *Dietzsch* v. *Huidekoper*, 103 U. S. 494, the Circuit Court in like manner granted an injunction against further proceedings in a state court which were incon-

sistent with the exercise by the Circuit Court of a jurisdiction already acquired. Disposing of the objection that the statute forbade the issue of an injunction, this court said:

> "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court. Dietzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending, and was finally determined in the United States Circuit Court. That court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented, their agents and attorneys. The bill in this case was filed for that purpose and that only." 103 U. S. 497.

And again:

> "As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by a direct proceeding. These views are sustained by the case of *French, Trustee*, v. *Hay*, (22 Wall. 250), between which and this case there is no substantial difference." 103 U. S. 498.

The foregoing cases were approved in *Moran* v. *Sturges*, 154 U. S. 256, 269 et seq.

The same rule was applied in *Julian* v. *Central Trust Company*, 193 U. S. 93. A bill was brought to restrain a levy on property purchased by the Southern Railway Company under a foreclosure decree against the Western

North Carolina Railroad Company. The levy was to satisfy a judgment recovered in a state court against the Western North Carolina Railroad Company on a cause of action arising subsequently to the foreclosure, and was based on the theory that the Southern Railway Company had not acquired a good title. This court said:

> "In such cases where the Federal Court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720, Rev. Stat., restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction." 193 U. S. 112.

In *Bowdoin College* v. *Merritt*, 59 Fed. Rep. 6, a bill was brought in the Circuit Court to remove a cloud upon title. Pending the suit a person not properly a party, but deemed by the Court to have submitted to the jurisdiction, brought an action in a state court setting up a claim on substantially the same grounds as those asserted by the defendants in the Circuit Court. On application the plaintiff in the Circuit Court was allowed to file a supplemental bill making the plaintiff in the state court a defendant and enjoining further proceedings in the state court. Mr. Justice McKenna, then the Circuit Judge, upheld the right to an injunction on the ground that the federal court had first acquired jurisdiction of the controversy.

See also *Sharon* v. *Terry*, 36 Fed. Rep. 337, 365, per Field, J.

State Trust Co. v. *Kansas City P. & G. R.R. Co.*, 110 Fed. Rep. 10.

Stewart v. *Wisconsin Central Ry. Co.*, 117 Fed. Rep. 782.

The test by which the application of Section 720 of the Revised Statutes is to be determined is the same as the test of federal jurisdiction. If the proceeding in which an injunction is sought is in fact ancillary, so that the court is authorized to take jurisdiction for that reason alone, although there is not the requisite diversity of citizenship, then the provision of the Revised Statutes does not apply because the injunction is incidental or ancillary to the exercise of its jurisdiction by the Circuit Court, and an injunction may be granted.

In the present case the bill seeking an injunction was filed to restrain a proceeding in the state court by which it was sought to annul the decree of the Circuit Court under which the foreclosure sale was had and under which the petitioner claimed title. The original foreclosure suit was still pending in the Circuit Court awaiting the decision of this court upon an appeal. If the appeal was dismissed, leaving the final decree of the Circuit Court unreversed, as in fact happened, then the proceeding in the state court, if successful, would defeat and was solely intended to defeat the operation of that decree. A stronger case for an ancillary bill and for restraining proceedings in the state court to enable the Circuit Court to exercise its jurisdiction over a subject-matter to which that jurisdiction had long before attached, cannot well be imagined.

THIRD.

THE DECREE OF THE CIRCUIT COURT IN THE FORECLOSURE SUIT WAS EFFECTUAL TO FORECLOSE THE MORTGAGE WHEREVER THE LAND WAS SITUATED.

I.

A suit to foreclose a mortgage is transitory.

The jurisdiction of the court did not depend on the land being situated in Georgia, however much or little that fact might determine the form of decree or propriety of granting relief.

A suit in equity to foreclose a mortgage is a transitory action that may be brought wherever jurisdiction over the persons of the necessary parties can be obtained.

> "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal." *Phelps* v. *McDonald*, 99 U. S. 298, 308.

This rule was applied by this court to the foreclosure of mortgages in *Muller* v. *Dows*, 94 U. S. 444, and is in accord with recognized principles of equity jurisdiction elsewhere.

Toller v. *Carteret*, 2 Vern. 494.
Penn. v. *Lord Baltimore*, 1 Ves. Sr. 444.
Paget v. *Ede*, L. R. 18 Eq. 118.
Mead v. *N. Y. H. & N. R. R. Co.*, 45 Conn. 199, 223.
Reed v. *Reed*, 75 Me. 264.
Eaton v. *McCall*, 86 Mc. 346.
Pingree v. *Coffin*, 12 Gray 288.
Trust Co. v. *Olmsted*, 102 N. Y. 729.

In denying the location of any part of the land in Georgia the defendants are not contradicting any fact on which jurisdiction depends.

II.

The Circuit Court had power effectually to decree the foreclosure of a mortgage covering land outside the district.

In *Muller* v. *Dows*, 94 U. S. 444, a bill was brought in the Circuit Court for the district of Iowa by the trustee of a mortgage, executed by a railroad corporation organized under the laws of Iowa and also under the laws of Missouri, covering property partly in the one state and partly in the other. The mortgagor corporation was sued as a corporation organized under the laws of Iowa only. The Circuit Court decreed a foreclosure and sale of the whole property.

On appeal this court held that the decree was valid and that the Circuit Court could foreclose the mortgage on the entire property and order a sale of the entire property. The decision was put upon the obvious necessity for some means of foreclosing such mortgages, and upon the control of the court over the property, though a part was without its territorial jurisdiction, by reason of the presence before the court of all persons interested and its power to compel such acts to be done by them as might be required to effectuate the result.

The jurisdiction thus established has since been freely exercised by the Circuit Courts.

Boston Safe Deposit & Trust Co. v. *Bankers & M. Tel. Co.*, 36 Fed. Rep. 288.

Ford v. *Delta & Pine Land Co.*, 43 Fed. Rep. 181, 189.

Woodbury v. *Allegheny & K. R.R. Co.*, 72 Fed. Rep. 371, 375.
International B. & T. Co. v. *Holland Trust Co.*, 81 Fed. Rep. 422.

In *Central Trust Company* v. *Wabash, St. L. & P. Ry. Co.*, 29 Fed. Rep. 618, Mr Justice Brewer, speaking of the foreclosure of a mortgage covering the entire Wabash Railroad system which extended into several states, said:

> "Of the propriety of a foreclosure in one court operating upon the entire property running through several states, and of the validity of a sale made in pursuance of that foreclosure, and the completeness of the title which will pass by such sale, there can be now no longer a question. In the case of *Muller* v. *Dows*, 94 U. S. 444, that question was put at rest." p. 620.

In *Farmers L. & T. Co.* v. *Chicago & Atlantic Ry. Co.*, 27 Fed. Rep. 146, 148 Judge Gresham assumed that a decree might be entered in one circuit foreclosing as an entirety a mortgage covering a railroad extending into several states.

In the present case, as in *Muller* v. *Dows*, the Circuit Court had before it all the parties necessary to enable it to make an effectual foreclosure. Even if the Alabama and Georgia Company should be deemed two corporations and not to be bound by the decree except as a corporation of Georgia, it would be immaterial because the equity of redemption was vested in the Huguley Company and that corporation was certainly before the court.

III.

It is immaterial that the decree of foreclosure did not require a confirmatory deed from the mortgagor or owner of the equity of redemption.

It has sometimes apparently been erroneously supposed that the decision of this Court in *Muller* v. *Dows* depended wholly upon the decree requiring a deed to be executed by the mortgagor or the trustee or both. By the decree appealed from in that case:

> "The court decreed a sale of the entire property covered by the mortgage, and directed the master, who was ordered to make the sale, to execute a good and sufficient deed or deeds to the purchaser. It also declared that after the sale both the defendant corporations and the complainants, trustees named in the mortgage, as well as all persons claiming under them or either of them, be barred and foreclosed from all interest, estate, right, claim, or equity of redemption of, in, and to the property reserving, however, the rights of the holders of the bonds and coupons secured by the first mortgage, then remaining outstanding and unpaid. It directed that the two defendant corporations should surrender to the purchaser the property sold and conveyed, upon the execution, approval, and delivery of the master's deed; and that, as further assurance, the Chicago and South-western Railway Company should, on the approval and delivery of the master's deed, convey all the property therein described to the purchaser, by their good and sufficient deed." 94 U. S. 448.

Comparing the case and this decree with a Pennsylvania case cited in support, this court said:

> "The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees

> to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made." 94 U. S. 450.

The Court did not, it will be noticed, rely upon the execution of any deed by the trustee, for none had been executed; and it dealt with the deed from the mortgagor as "in further assurance."

There is no force in the suggestion that a decree ordering a sale and conveyance by a master in a suit in which the only persons in whom title could be vested were before the Court, fails of effect because it does not require those persons actually to execute a deed. It would obviously be within the power of the Court to appoint a master to execute such a deed in behalf of either of these parties to the suit, if either should be required to do so and should refuse. Such a course was followed in the suit out of which grew the case of *Root* v. *Woolworth*, 150 U. S. 401 (see statements of facts in that case, 150 U. S. at p. 402.)

A master appointed to make a sale where the court has all the parties before it, may certainly be given by the court all the powers that the court could require the parties before it to confer on the master to enable him to execute the decree. To require the mortgagor to execute a deed is, therefore, unnecessary, and only as this court said "in further assurance."

One other consideration is decisive of the point as far as the present case is concerned. The maintenance of the suit is not dependent on any question of the passage of title. The decree of foreclosure now in question, as is usual, provided that the equity of redemption should be thereby foreclosed as against the mortgagor and all persons claiming under it since the date of the trust deed. (Rec. p 360, par. 8.) This decree the court could certainly make as against the defendants personally, whether an

effectual sale and conveyance could be ordered or not, and one taking title under the sale ordered and made pursuant to the decree can certainly invoke the enforcement by the court of this part of the decree as a protection. The question is not now of the validity of the title of the plaintiff, nor of the propriety of the decree entered in the foreclosure suit—though we submit neither matter is really doubtful. If the court in the foreclosure suit could make a personal decree against the defendants in that suit claiming any title in this land, wherever situated, and has done so, then this suit can be maintained to enforce that decree.

The Circuit Court for the Northern District of Georgia, according to *Muller* v. *Dows*, unquestionably had jurisdiction to foreclose the mortgage; on any theory of that case it could have made a decree that would have carried a clear title to property in Alabama as well as to property in Georgia, for it could have ordered conveyances by all the respondents and even assuming that there was an Alabama and Georgia Company of Alabama not a party to and not bound by that decree, nevertheless the foreclosure would be effective because the entire equity of redemption was in the Huguley Company. If then the title conveyed by the master is imperfect without such confirmation, yet as the court has decreed the equity of redemption to be foreclosed it can, as against persons bound personally by that decree, restrain any attempt to assert an equity of redemption in defiance of the decree. Both the corporations, appellees in this suit, are it is submitted so bound, but the Huguley Company at any rate is indisputably bound by the foreclosure decree, and the Huguley Company according to the allegations of the appellees in their bill of complaint in the Alabama suit (Rec. p. 492) was the sole owner of the equity of redemption.

FOURTH.

THE VALIDITY OF THE FINAL DECREE OF THE CIRCUIT COURT IN THE FORECLOSURE SUIT WAS NOT OPEN TO THE COLLATERAL ATTACK MADE IN THE ALABAMA SUIT.

I

A final decree of the Circuit Court of the United States cannot be collaterally attacked on the ground that the diversity of citizenship necessary to give jurisdiction was lacking.

The appellees in their answer in the present suit and in their bill of complaint in the Alabama Court have relied much on the supposed lack of jurisdiction of the Circuit Court in the foreclosure suit. Their objection is based on the alleged lack of the necessary diversity of citizenship and on a supposed want of jurisdiction if the land mortgaged was situated in Alabama.

The appellees allege in support of their objection that they are citizens of Alabama, that the Huguley Company is a citizen of Alabama only, that the plaintiff in the foreclosure suit was also a citizen of Alabama, and that consequently if either of the appellees was a party to the foreclosure suit the jurisdiction of the court was ousted. (Rec. pp. 506, 507.) The same view seems to have been relied on to some degree by the Circuit Court of Appeals.

In the original foreclosure suit the Alabama and Georgia Company and the Huguley Manufacturing Company were described as corporations of Georgia. These allegations were admitted in the answer to that bill. (Rec. p. 14.) It is now alleged by the appellees that the Alabama and Georgia Company was also a corporation of Alabama and that the Huguley Company was a cor-

poration of Alabama only. So far as the Alabama and Georgia Company is concerned, it will be shown that the whole corporation is bound by the decree rendered against it when sued as a Georgia corporation. If such is not the case however, it creates no lack of jurisdiction in the Circuit Court so far as diversity of citizenship is concerned.

So far as relates to the Huguley Company, the position of the appellees is baldly that if a corporation is sued as a corporation of Georgia, and admits the allegation as to its citizenship, thus showing the necessary diversity of citizenship, yet if in fact the allegation is erroneous, any decree rendered is void for want of jurisdiction.

No such proposition can be successfully maintained. When a final decree or judgment has been rendered in the Circuit Court of the United States against a corporation described as organized under the laws of a given state and that allegation is not controverted the judgment or decree cannot be collaterally impeached on the ground that the allegation as to citizenship was untrue.

The courts of the United States are of limited jurisdiction, but they are not inferior courts, and where a final judgment or decree has actually been entered, all presumptions are to be made in favor of jurisdiction. If the jurisdiction is not shown upon the record, but a final decree or judgment is none the less rendered, that decree or judgment may be reversed on error or appeal, but cannot be collaterally attacked.

M'Cormick v. *Sullivant*, 10 Wheat. 192.
Ex parte Tobias Watkins, 3 Peters 193, 207.
Cutler v. *Huston*, 158 U. S. 423.

In like manner, if a suit is removed to the Circuit Court the final judgment or decree, if unreversed, is valid and

binding, although the facts justifying removal are not alleged in the record, and even though it is made to appear affirmatively that there was not a right to remove.

Des Moines N. & R.R. Co. v. *Iowa Homestead Co.*, 123 U. S 552.
Dowell v. *Applegate*, 152 U. S. 327.
Evers v. *Watson*, 156 U. S. 527.

In *Des Moines N. & R.R. Co.* v. *Iowa Homestead Co.* a bill in equity was brought in a state court in Iowa to recover certain amounts paid for taxes. The defendant relied upon a final decree in a suit between the same parties and others brought in a state court and removed by the defendants therein to the Circuit Court. The plaintiff contended that this decree was invalid because it appeared that some of the defendants, including the present defendant, were citizens of the same state as the plaintiff in that suit. This court, on writ of error to the Supreme Court of Iowa, held that the former decree was valid. This court said:

> "It is said, however, that these decisions apply only to cases where the record simply fails to show jurisdiction. Here it is claimed that the record shows there could be no jurisdiction, because it appears affirmatively that the Navigation and Railroad Company, one of the defendants, was a citizen of the same State as the plaintiff. But the record shows, with equal distinctness, that all the parties were actually before the court, and made no objection to its jurisdiction. . . . Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those

> between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity." 123 U. S. 558, 559.

Where the record on its face shows jurisdiction in the Circuit Court, and all the parties to the suit have acquiesced in the allegations showing jurisdiction, and in the assumption of jurisdiction by the court, the case is much stronger. To allow a defendant under such circumstances to controvert collaterally the existence of the facts is not only to permit him to attack collaterally the judgment or decree, but to permit him to do this after he has expressly admitted the existence of the necessary facts and thus led the court to assume and exercise the jurisdiction which he now seeks to deny.

This court has held that where the record states facts necessary to give jurisdiction which are not denied, the final decree cannot be attacked collaterally, though it is alleged that the statement of those facts was false and made only for the purpose of bringing the suit in the Circuit Court.

Lacassagne v. *Chapuis*, 144 U. S. 119.

In that case a suit had been brought by one alleging herself to be an alien to establish a right to land against a citizen of Louisiana, and the plaintiff obtained a decree. Subsequently, a suit was there brought against the executor of the former plaintiff by persons not parties to the former suit, claiming as mortgagees of the former defendant to recover the property on the ground, among others, that the decree in the first suit was void because the plaintiff therein was in fact a citizen of Louisiana, so that the Circuit Court had no jurisdiction. This court said:

> "As to the allegation in the bill that the court was without jurisdiction of the suit brought by the widow Cavé, because she alleged falsely therein that she was a citizen of France, when in fact she was a citizen of Louisiana, and thus the court had no jurisdiction of the suit as between her and Marceline Cavailhez, that question cannot be raised and adjudicated in this suit. By the record of the former suit, there appeared to be jurisdiction, and the plantiff cannot question it by means of this suit, when the question is not raised by Marceline Cavailhez, who was the defendant in the former suit." 144 U. S. 126.

In the original foreclosure suit the Huguley Manufacturing Company was sued under the description of a corporation organized under the laws of Georgia; it appeared and admitted the allegation. If the corporation in fact existed under the laws of Alabama, there was a misdescription in the nature of a misnomer, but the identity of the corporation appears on the record, and that corporation cannot now consistently with the principles laid down in the authorities cited assert that all the proceedings were void as to it, when its own admission led the court to take jurisdiction. It is clear from the decisions that no principle of law renders the final decree of the Circuit Court for the Northern District of Georgia in the original foreclosure suit a nullity for want of jurisdiction. It is equally clear that the respondent has by its acts estopped itself from asserting facts impeaching the jurisdiction, since it has deliberately admitted a fact, peculiarly in its own knowledge, the truth of which establishes the existence of that jurisdiction.

If an estoppal can ever be created, it must arise against one who for ten years has allowed a litigation to continue, involving three appeals to the Circuit Court of Appeals and an appeal to this court, and at the end of that litigation seeks to avoid the result by denying an

allegation admitted at the outset and never questioned throughout the proceedings.

II

The jurisdiction of the Circuit Court could not be attacked on the ground that no part of the land was situated in Georgia.

The Huguley Company is indisputably the same corporation that was a party to the foreclosure suit, and is, therefore, bound as a party to that suit. The same is true of the Alabama and Georgia Company, unless the court should hold that there are two wholly distinct corporations of that name.

A party to a suit cannot, after a final decree, impeach that decree by alleging and seeking to prove that matters of fact necessary to sustain the decree and properly alleged were untrue. If such facts were denied in the former suit there has been an adjudication which is binding; if not denied, the defendant has had an opportunity to put them in issue and cannot collaterally attack the judgment or decree on any ground involving a denial of those allegations. This cannot be done even in the case of foreign judgments.

Ritchie v. *McMullen*, 159 U. S. 235, 242.

A judgment of a court of general, as distinguished from inferior, jurisdiction can be impeached collaterally only on the ground that the court had not jurisdiction of the person of the party or of the subject matter of the litigation. Facts necessary to establish such lack of jurisdiction can be shown even if doing so contradicts statements in the record; as to all other matters the record is conclusive.

The foundation of this exception to the conclusive effect of records is plain and serves to show the limits of the exception. If a defendant has not in fact been brought into court he has not had his day and should not be concluded by the action of the court. The record as to him is no record. To say that he cannot show the failure to obtain jurisdiction of his person because such jurisdiction is by the return of an officer or otherwise shown upon the face of the record, is, as has been said by this court, to reason in a circle; such a position involves saying that it is a record because there was jurisdiction of his person and that jurisdiction of his person is shown because it was a record.

In like manner, to give jurisdiction of the subject matter the subject matter must exist, and its non-existence may be shown in contradiction of the record. If a vessel is condemned as lawful prize the vessel must in fact have been captured, *Rose* v. *Himely*, 4 Cranch 241, 269; if an administrator is appointed it must be of the estate of one actually dead, *Scott* v. *McNeal*, 154 U. S. 34; if seizure and possession of a *res* within the bailiwick is the foundation of jurisdiction, there must be a *res* which was so seized, *Thompson* v. *Whitman*, 18 Wall. 457.

In every such case there can be no question of jurisdiction, no binding record, unless the subject matter on which, or by reason of which, the court is to act exists, and, therefore, its non-existence can be shown notwithstanding the record and judgment.

The cases, however, in which jurisdiction exists only by reason of the existence of some particular subject matter or *res* for the court to act upon are practically few. Jurisdiction to act ordinarily exists whenever a controversy is presented to the court for adjudication. Even though the case be one which by law the court should refuse to entertain, there is no such lack of jurisdiction as renders its action a nullity.

> "The power to hear and determine a cause is jurisdiction; it is 'coram judice,' whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction, whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law." *United States* v. *Arredondo*, 6 Peters 691, 709.

The court may commit an error in proceeding with the case at all, as where in the federal court there is not the requisite diversity of citizenship or amount involved, or may commit an error in its finding of facts necessary to authorize the relief granted, or may commit an error of law in its decision upon the right to any relief, or may grant relief in equity when there exists an adequate remedy at law, but in all these cases alike it is error and must be corrected by direct proceedings.

Des Moines N. & R.R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
In re Sawyer, 124 U S. 200 220, 221.
Dowell v. *Applegate*, 152 U. S. 327, 340.
Mellen v. *Moline Iron Works*, 131 U. S. 352, 367.
Hollins v *Brierfield Coal & Iron Co.*, 150 U. S. 371 380.

In the present case the bill in the foreclosure suit set forth a cause of action clearly within the jurisdiction of the Circuit Court. It described a part of the mortgaged premises, by referring to the copy of the mortgage deed annexed to the bill (Rec. pp. 2, 4), as in Georgia. The allegation that a part of the land was in Georgia was not

in any sense the allegation of a jurisdictional fact, for the court had jurisdiction at least to determine whether that part of the land was within or without the boundary of the state. Whatever error it might commit in such decision, and whatever effect that error might have on the virtue of the master's deed, there was no lack of jurisdiction. The Huguley Company, therefore, could not collaterally attack the decree or the effect of acts done under it on the ground that this allegation was erroneous.

Of course in point of fact, as has been shown, the allegation was not material, because the court could decree foreclosure in any event, but it was not even open to the appellees to raise the question.

FIFTH.

THE HUGULEY COMPANY WAS BOUND BY THE DECREE IN THE FORECLOSURE SUIT WHETHER ORGANIZED UNDER THE LAWS OF GEORGIA OR NOT.

I.

The Huguley Company now before the Court is the same corporation that was a party to the foreclosure suit.

It is alleged in the answer filed by the appellees in the Circuit Court (Rec. pp. 506, 507) that the Huguley Company was never incorporated in Georgia. Assuming this to be true, the corporation of that name, an appellee in the present suit, is none the less bound by the foreclosure decree.

There is no dispute as to the identity of the corporation now before the court with the corporation of the

same name which was a party to the foreclosure suit. In the fifth paragraph of the answer filed by the Huguley Company in the present suit it is alleged:

> "For further answer, respondents aver that this court was without jurisdiction of said original foreclosure cause for that the complainant therein and the Huguley Manufacturing Company were citizens of the same State, to wit: the State of Alabama. In this connection, respondents aver on information and belief that said Huguley Manufacturing Company was never incorporated or organized in the state of Georgia although, as they further aver, the solicitors who represented said corporation in said former litigation in this court were not aware it was not so incorporated, and said fact was not discovered until after the filing of said suit in Alabama, and before the bringing of this suit." (Rec. p. 507.)

This contains a clear statement that the corporation represented "in said former litigation" and the corporation of the same name in this litigation are one and the same.

The allegation of the ninth paragraph of the answer does not deny that the Huguley Company was a party to the foreclosure suit. The allegation (Rec. p. 508) is that the respondents "were never parties as corporations under the laws of Alabama to said foreclosure proceedings." As the Huguley Company existed only as a corporation of Alabama and as the Huguley Company was a party to the foreclosure suit, it follows that the corporation now before the court is the corporation a party to the foreclosure suit.

Again, the bill filed by the Huguley Company and the Alabama and Georgia Company in the state court in Alabama alleges (Rec. p. 488) as to the foreclosure suit that

> "a corporation, known as the 'Alabama and Georgia Manufacturing Company,' alleged to be a corporation organized under the laws of Georgia only, and said Huguley Manufacturing Company, together with the said W. T. Huguley, were the sole defendants to said bill."

"Said Huguley Manufacturing Company" is the corporation of that name plaintiff in the Alabama bill and there alleged to have been a defendant in the foreclosure suit, and the Huguley Manufacturing Company plaintiff in the Alabama bill is indisputably the defendant named in this bill.

The same identity is apparent from the whole record, leaving out these admissions of the pleadings. The property described in the Alabama bill (Rec. pp. 486, 487) as belonging to the Huguley Company, there a plaintiff, is identical with the property described in the foreclosure suit (Rec. pp. 4, 5) and sold under the decree of the Circuit Court (Rec. pp. 379, 390) to which the Huguley Company, there a defendant, asserted its title. The officer of the Huguley Company who executed the bonds on the last appeal in the foreclosure suit (Rec. p. 471) is identical with the officer of the Huguley Company who swore to its answer in the present suit (Rec. p. 510.)

The question is reduced then purely to this—whether if a corporation existing under the laws of one state is sued and erroneously described as organized under the laws of another state, and appears and defends upon the merits, admitting the erroneous allegation, a final decree rendered against it is void.

II.

A final decree against a corporation cannot be impeached for an erroneous allegation admitted by the defendant as to the state under the laws of which the corporation exists.

In the foreclosure suit the Huguley Company was described as a corporation organized under the laws of Georgia. (Rec. p. 1.) This statement may be deemed an allegation designed to show the jurisdiction of the Court by reason of diversity of citizenship, or like the corporate name of the defendant a description to identify the defendant.

It has already been shown that an error in an allegation of citizenship designed to show jurisdiction does not render the final judgment or decree void or open to collateral attack.

An error in the description of the defendant's place of residence can have no effect except as a misnomer. The place of residence is not material for any other purpose.

The law is settled that a misnomer to which no objection is taken by plea in abatement does not impair the validity of the final judgment or decree. If the person or corporation actually intended to be sued is served with process and permits judgment to be rendered by default, or appears and failing to plead in abatement unsuccessfully defends the suit, the final judgment or decree against it is good. If the suit is brought on the judgment or decree, the identity of the defendant in that suit and in the former suit may be alleged and the judgment roll or record be introduced in support of the plaintiff's case, with such proof as may be required to show the identity.

Black on Judgments, Sect. 213.

In *The Lafayette Insurance Co.* v. *French*, 18 How. 404, an action was brought against "the Lafayette Insurance Co., a citizen of the state of Indiana." The action was on a judgment recovered in Ohio against "the president, directors and company of the Lafayette Insurance Co." The court said the difference in name did not prevent the judgment being given in evidence to support the action since it was averred that the judgment was recovered against the defendants in the suit then pending, and it must be assumed that fact was proved. As to the effect of a mistake in name the court said:

> "the only question open here is, whether, if a mistake be made in the name of a defendant, and he fails to plead it in abatement, the judgment binds him, though called by a wrong name. Of this we have no doubt. Evidence that it was an erroneous name of the same person must, therefore, be admissible; otherwise, a mistake in the defendant's name, instead of being available only by a plea in abatement, would render a judgment wholly inoperative." 18 How. 409.

The same doctrine prevails in the state courts.

Guinard v. *Heysinger*, 15 Ill. 288.
Pond v. *Ennis*, 69 Ill. 341.
Hoffield v. *Board of Education*, 33 Kan. 644.
Cleaveland v. *Boston Five Cents Sav. Bk.*, 129 Mass. 27.
National Bank v. *Distilling Co.*, 41 W. Va. 530.

In *Smith* v. *Bowker*, 1 Mass. 76, it was held that a misdescription of the place of residence of a defendant did not impair the judgment, service having in fact been made on the right person.

The same rule applies if the error is in the name or description of the plaintiff.

> *United States National Bank* v. *Venner*, 172 Mass. 449.
> *Washington Co. Nat. Bk.* v. *Lee*, 112 Mass. 521.
> *Thatcher* v. *West River Nat. Bk.*, 19 Mich. 196.

In the present case the identity of the Huguley Company, now before the court with the Huguley Company defendant in the foreclosure suit, was duly alleged. The bill set forth the fact that the foreclosure suit was brought against the Huguley Manufacturing Company which was the owner of the equity in the mortgaged premises (Par. II, Rec. p. 474), and that "the said Huguley Manufacturing Company" with the Alabama and Georgia Company after prosecuting unsuccessfully the last appeal to the Circuit Court of Appeals filed the bill in the Alabama Chancery Court (Par. VI, Rec. p. 478). These allegations were not denied by the present defendants. (See Answer, Rec. p. 505.)

The identity of the present defendant Huguley Manufacturing Company with the corporation of the same name defendant in the foreclosure suit is, therefore, fully alleged, the allegation is not controverted, and the final decree cannot be impeached for the error in describing it as a corporation created by the laws of Georgia.

SIXTH.

AS THE FORECLOSURE DECREE WAS BINDING ON THE HUGULEY COMPANY THE PRESENT SUIT IS MAINTAINABLE, EVEN THOUGH THAT DECREE WAS INVALID AGAINST THE ALABAMA AND GEORGIA COMPANY AS A CORPORATION OF ALABAMA.

I.

The Huguley Manufacturing Company at the time of the foreclosure was the owner of the equity of redemption.

The record shows throughout that the Huguley Company was the owner of the equity of redemption in the mortgaged premises and the real party defendant in all the proceedings.

The original foreclosure bill alleged (Rec. p. 2) that the Huguley Manufacturing Company was the owner of the equity of redemption in the mortgaged premises when the bill was filed. The Huguley Company not only failed to deny this allegation, but by an amendment to its answer expressly alleged that it was such owner (Rec. p. 22).

After the first and invalid sale of the property at foreclosure in 1892, the Huguley Manufacturing Company petitioned for restitution, again alleging its ownership and that at the time of sale it was in possession (Rec. pp. 158, 160).

After the second sale of the property at foreclosure in 1896 the Huguley Manufacturing Company filed its answer to a petition for confirmation of the sale. This answer alleged (Rec. p. 392), "This respondent is the real owner of said property, and the real party in interest as defendant in the foreclosure proceedings."

The Huguley Manufacturing Company alone of the respondents in the foreclosure suit filed exceptions to the master's report on the petition for an account of rents and profits (Rec. p. 411.) Counsel for the Huguley Manufacturing Company petitioned for an allowance of fees (Rec. p. 426). The Huguley Manufacturing Company alone petitioned for an ascertainment of the balance on the mortgage debt (Rec. p. 433), opposed the petition of the purchasers for a deed (Rec. p. 442), moved for a reconsideration of the order of the court on this petition (Rec. p. 448), and joined as the principal appellant in the appeal to the Circuit Court of Appeals (Rec. p. 452).

The bill filed in the Alabama state court by these appellees alleged in paragraph seventh that the Huguley Company "purchased and acquired all the property herein above described subject to said mortgage, and is now the owner of the same, subject to said mortgage." (Rec. p. 492.)

Finally, it was alleged in paragraph second of the bill of complaint filed by the appellant that the Huguley Manufacturing Company became the purchaser of the mortgaged premises subject to the mortgage. This allegation is not denied in the answer.

II.

The Alabama and Georgia Company was not a necessary party to a foreclosure of the mortgage.

It is the well settled law that to a foreclosure suit the mortgagor is not a necessary party if the entire interest of the mortgagor in the property mortgaged has been conveyed away. In order to secure a decree for payment of a deficiency the mortgagor must of course be joined,

since such a decree rests upon the personal obligation of the mortgagor and can be enforced only in a proceeding to which he is a party.

A suit to foreclose the mortgage is not a suit to enforce a personal obligation. The foreclosure is to cut off the equity of redemption and the only necessary party to such a suit is the party in whom the right of redemption is vested.

Jones on Mortgages, 6th Ed., Sec. 1404.
Story on Equity Pleadings, 10th Ed., Sec. 197.

In *Bigelow* v. *Bush*, 6 Paige 343, a suit was brought to foreclose a mortgage. The mortgagor, who had conveyed all his interest in the property was not joined as a defendant. Chancellor Walworth held that the mortgagor was not a necessary party to the suit.

Speaking of the mortgagor's position, he said:

> "He was, therefore, a proper although not a necessary party, to a bill of foreclosure against the grantee of the equity of redemption. In other words so far as concerns this first mortgage, the complainant might, if he had thought proper, have made the mortgagor a party, for the purpose of having a decree over against him for a deficiency. But the assignee of the equity of redemption, who had no interest whatever in that question, and who could not be in any way benefited by having him made a party for that purpose, has no right to object that the original mortgagor is not a party to the suit." 6 Paige 345.

In Alabama the same rule has been laid down.

Wilkinson v. *May*, 69 Ala. 33.
Thomas v. *Jones*, 84 Ala. 302.
Boutwell v. *Steiner*, 84 Ala. 307.

The doctrine has been followed uniformly wherever the question has arisen.

Belloc v. *Rogers*, 9 Cal. 123.
Gutzeit v. *Pennie*, 98 Cal. 327.
Swift v. *Edson*, 5 Conn. 531.
Stevens v. *Campbell*, 21 Ind. 471.
Davis v. *Hardy*, 76 Ind. 272.
West v. *Miller*, 125 Ind. 70.
Johnson v. *Monell*, 13 Iowa 300.
Johnson v. *Foster*, 68 Iowa 140.
Miller v. *Thompson*, 34 Mich. 10.
Osborn v. *Crump*, 57 Miss. 622. Semble.
Chester v. *King*, 2 N. J. Eq. 405.
Root v. *Wright*, 21 Hun. 344.
Miner v. *Smith*, 53 Vt. 551.
Delaplaine v. *Lewis*, 19 Wis. 476.

In *Ayres* v. *Wiswall*, 112 U. S. 187, this court held a suit brought against the original mortgagors and purchasers from them seeking a foreclosure and a personal decree for a deficiency could not be removed to the Circuit Court if one of the mortgagors was a citizen of the same state as the plaintiff. The suit in that case was brought specifically to enforce the personal liability and the court rested its decision on that ground. The case in no wise conflicts with the rule that the mortgagor need not be joined as a party to secure merely a foreclosure.

In the foreclosure suit originally brought by Robinson, the trustee, no relief was sought by way of enforcing a personal liability. The bill prayed only (Rec. p. 3) for a determination of the amount secured, payment thereof by a short day on pain of foreclosure, upon default in such payment a sale by order of court, the appointment

of a receiver *pendente lite* and an injunction against interference with the property. The suit was thus purely a foreclosure suit and as the Alabama and Georgia Company had parted with all title, that corporation was not a necessary party to the suit either as a corporation of Georgia or of Alabama.

III.

It is immaterial that the Alabama and Georgia Company was joined as a defendant in the foreclosure suit.

The original foreclosure bill did not pray for a deficiency decree (Rec. p. 3). The bill joined the Alabama and Georgia Company as a defendant. If the proceedings in that suit are binding upon the Alabama and Georgia Company wherever organized, then both appellees are fully bound by the foreclosure decree and it is clearly immaterial whether one of them was unnecessarily joined or not. If the Alabama and Georgia Company as a corporation of Alabama was not bound by the proceedings in the foreclosure suit, then as to any personal relief that was decreed against it the decree would not be binding upon it in that capacity. But this hypothesis rests upon the theory that such corporation was not a party, therefore the result only is that a party unnecessary to an effectual decree for a foreclosure was not joined.

The Alabama and Georgia Company at least as a Georgia corporation was a party to the foreclosure suit and bound by the proceedings. It was unnecessary in order to effect a valid foreclosure that the corporation should be joined. So far, if at all, as the decree purported to give personal relief by enforcing a personal liability that corporation was a proper party whether there was a dual corporation of the same name and bound by the proceedings or not.

It is clear that the joinder or non-joinder of the Alabama and Georgia Company or of either of its parts, if these are separate entities, cannot affect the validity of a decree against the Huguley Manufacturing Company. At most the joinder or non-joinder would be error, but even if error and a fatal error, it does not affect the validity of the decree. There was no lack of jurisdiction over the Huguley Company, nothing to disable the court from making a decree cutting off all equity of redemption as to it. The defence of non-joinder or of misjoinder could be waived like any other defence in equity. Not having objected at the time the Huguley Company cannot now impeach a decree rendered against it on the ground that it had a defence.

> *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380.

So, too, if the decree went further than the mere ordering of a foreclosure sale and cutting off the equity of redemption, such additional relief might be erroneously granted but could not invalidate the sale. The sale could be ordered and the equity of redemption cut off if the Huguley Company alone had the equity of redemption, so long as that company was brought before the court. If the court ordered other relief, and erred in doing so, it could not make the decree invalid so far as the relief rightly granted against the Huguley Company was concerned.

In any respect, therefore, it becomes immaterial for the purpose of determining whether the equity of redemption is cut off to determine whether the Alabama and Georgia Company is bound, both as a Georgia and as an Alabama corporation or not. The record shows that the equity of redemption was in the Huguley Company and shows that

that company was bound by the decree foreclosing that right; nothing more was required to support the present bill.

IV.

The Huguley Manufacturing Company is the only real party in interest in the suit in Alabama and in the present suit.

The only purpose of the present suit is to protect the foreclosure and give effect to the decree of the Circuit Court cutting off the equity of redemption.

The suit brought in the Alabama State Court asked as relief (1) that the equity of redemption should be established as still existing; (2) that an account of rents and profits pending the foreclosure suit should be taken; (3) that a decree for such rents and profits should be rendered in favor of the complainants; (4) that a receiver be appointed to operate the mills *pendente lite;* (5) that the mills be kept insured; and (6) for general relief. (Rec. pp. 492, 493.)

It is clear that all of the relief asked rests upon the ground that the owner of the equity of redemption is not bound by the foreclosure decree. The first prayer is directly to establish an equity of redemption and all the other prayers are for relief incident to such right.

In none of the matters as to which relief is asked has the Alabama and Georgia Company any real interest. The equity of redemption, it has been shown, was confessedly in the Huguley Company when the original foreclosure suit was brought. The right to the rents and profits for which an account is asked, had any such right existed, would likewise have been wholly in the Huguley Company.

The Alabama and Georgia Company had no interest in an account of the rents and profits pending foreclosure. On the facts alleged in the bill in the Alabama state court the Huguley Company was not bound to pay the bonds; it was interested in the application of the rents and profits to such payment solely as a means of avoiding foreclosure. So far from conceding the right on the part of the Alabama and Georgia Company to have the rents and profits applied in payment of the mortgage bonds to its exoneration, one of the grounds alleged for the last appeal in the foreclosure suit to the Circuit Court of Appeals was the application of the rents and profits allowed in that suit to the reduction of the mortgage debt in alleged derogation of the rights of the Huguley Company (Rec. p. 459). While as between the bondholders and the Huguley Company the former were entitled to this application of the rents and profits, and it was so decided by the Circuit Court of Appeals, the Huguley Company, as between it and the Alabama and Georgia Company, was entitled to such rents and profits from the time it acquired title to the property subject to the mortgage.

Tubb v. *Fort*, 58 Ala. 277.

The Alabama and Georgia Company, therefore, had no interest in this relief.

Finally the appointment of a receiver was asked solely for the benefit of the Huguley Company as alleged owner of the property in order to protect the property during the pendency of the suit.

These considerations show that the Alabama and Georgia Company was merely a nominal party in the Alabama State Court. The suit there was brought solely in the interest of the Huguley Company and was founded exclusively on alleged rights of the Huguley Company in

the property. The present suit was brought to restrain the prosecution of the suit in the Alabama State Court; no other relief is sought (Rec. p. 481). In the present suit, therefore, the real party in interest is the Huguley Company and it alone.

V.

This suit is, therefore, maintainable against the Huguley Company irrespective of the Alabama and Georgia Company.

Since the Huguley Company is the only real party in interest in the Alabama suit, and, therefore, in this suit, it is clear that the bill should not be dismissed for want of jurisdiction if there is no want of jurisdiction over the Huguley Company. If the Huguley Company was bound by the foreclosure decree there can be no doubt of the jurisdiction of the Circuit Court over the subject matter of this suit so far as the Huguley Company is concerned. Every issue raised in this suit relating to the rights of the parties in the property in question was raised or could have been raised in the foreclosure suit. This suit, therefore, as to the Huguley Company is solely a suit to prevent that corporation from attacking collaterally in the state court in Alabama a decree rendered by the Circuit Court which is by the hypothesis binding on the Huguley Company. Such a suit is beyond question an ancillary proceeding.

The fact that the Alabama and Georgia Company is joined in this suit as a defendant, because it is joined in the Alabama suit as a plaintiff, cannot affect the jurisdiction of the Circuit Court in this suit so far as the Huguley Company is concerned; as to that corporation, therefore, at any rate the suit is maintainable, and as no

objection has been taken to the joinder of the Alabama and Georgia Company any error in joining it has been waived.

The validity or invalidity of the decree as against the Alabama and Georgia Company, either in the foreclosure suit or in this suit, is not material. Even if either decree was void as to the latter corporation for want of jurisdiction or other cause, it would not invalidate the decree as against the Huguley Company.

Kitchens v. *Hutchins*, 44 Ga. 620.
Newburg v. *Munshower*, 29 Oh. St. 617.

If the party against whom an invalid decree is rendered is not a necessary party to the proceeding *à fortiori* the invalidity of the decree as against him cannot affect its validity as to a co-defendant.

SEVENTH.

THE ALABAMA AND GEORGIA COMPANY, ONE OF THE APPELLEES IN THIS SUIT, WAS ALSO IN FACT BOUND BY THE DECREE IN THE FORECLOSURE SUIT.

I.

A corporation organized under the laws of two states is a single corporation as to its acts, obligations and liabilities.

A corporation created by charters from two separate states, each constituting the same individuals a corporation under the same name and with the same powers, has, for purposes of transacting business, only one existence.

For special purposes it may be important to distinguish between the entity created by the laws of one state and that created by the laws of the other. For all purposes of corporate action and liability the distinction does not exist.

In *Graham* v. *Boston, Hartford & Erie Railroad Co.*, 118 U. S. 161, a stockholder in the railroad company sought to have a mortgage declared void and set aside on the ground that it was not authorized by the stockholders. The corporation was one existing under the laws of New York, Massachusetts, Rhode Island and Connecticut. The only authority for the mortgage was a vote at a meeting of stockholders held in New York. This court held the mortgage valid, saying:

> "That a meeting in one of several States of the stockholders of a corporation chartered by all those States is valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those States, is, we think, a sound proposition. Whether it be or be not true that proceedings of persons professing to act as corporators, when assembled without the bounds of the sovereignty granting the charter, are void, *Miller* v. *Ewer*, 27 Maine 509, there is no principle which requires that the corporators of this consolidated corporation should meet in more than one of the States in which it has a domicil, in order to the validity of a corporate act." (pp. 168, 169.)

Describing the nature of the corporation itself, Mr. Justice Blatchford, delivering the opinion of the court, said:

> "The Boston, Hartford & Erie Company, therefore, though made up of distinct corporations, chartered by the legislatures of different States, had a capital stock which was a unit, and only one set of shareholders, who had an interest, by virtue of

> their ownership of shares of such stock, in all of its property everywhere. In its organization and action, and the practical management of its property, it was one corporation, having one board of directors, though, in its relations to any State, it was a separate corporation, governed by the laws of that State as to its property therein. It, therefore, had a domicil in each State, and the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one State, so as to bind the corporation in respect to its property everywhere. *Bridge Co.* v. *Mayer*, 31 Ohio St. 317; Pierce on Railroads, 20." 118 U. S. 169, 170.

The principle was involved to some extent, although not expressly passed upon by the court in *Nashua & L. R.R. Co.* v. *Boston & L. R.R. Co.*, 136 U. S. 356. In that case the plaintiff corporation was organized in New Hampshire. Later an identical corporation was created in Massachusetts; and still later a statute was passed in Massachusetts apparently intended to effect complete consolidation and two months after an act was passed in New Hampshire authorizing such a union. The corporation brought suit in the Circuit Court in Massachusetts describing itself as a corporation organized under the laws of New Hampshire for an accounting under a contract between the consolidated or "interstate" corporation and the defendant. Objection was taken to the jurisdiction on the ground that the corporation was also organized in Massachusetts, and to the merits on the ground among others that, if the suit was maintainable, the Massachusetts corporation was a necessary party. p. 362.

The court held that the Circuit Court had jurisdiction and also decided for the plaintiff on the merits, thus repudiating the argument that for purposes of enforcing

the obligation or obtaining a final and binding adjudication there was a second corporate entity that must be made a party.

In *Railroad Co.* v. *Vance*, 96 U. S. 450, a corporation chartered by the laws of Indiana and Illinois sought by suit in the Circuit Court of the United States in Illinois, describing itself as a corporation organized under the laws of Indiana, to restrain the levy of a tax assessable only on railroad corporations organized under the laws of Illinois. This court held that the tax was in fact assessed upon a corporation organized under the laws of Illinois, and, therefore, dismissed the case on the merits. No intimation was made that there were two corporations for any practical purpose of determining rights or liabilities. Obviously, if the statutes of Illinois constituted a charter as distinguished from a mere license to an existing corporation to operate in Illinois, the corporation chartered was none the less subject to the tax law of Illinois because it was also a corporation under the laws of Indiana.

In *Muller* v. *Dows*, 94 U. S. 444, the court held a single decree sufficient to foreclose a mortgage of property situated partly in Missouri and partly in Iowa and owned by a corporation formed by the consolidation of two corporations of the same name and organized under the laws of those states respectively.

The consolidation was under general statutes, providing that a railroad connecting with another railroad outside the state might "merge and consolidate the stock of the respective companies, making one joint-stock company of the railroad thus connected." The result of this merger the court described by saying:

> "The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone." p. 447.

The merger thus effected by authority of statute in the case of these railroad corporations is the same in effect as incorporation by each of two states of the same individuals as a private corporation to carry on a single enterprise.

This court has not been called upon in any other case actually to determine the effect of such a double incorporation, except for purpose of federal jurisdiction, but the inferior courts of the United States and some state courts have made decisions dealing with the effect on actual rights and liabilities.

In *Uphoff* v. *C. St. L. & N. O. R.R. Co.*, 5 Fed. Rep. 545, the court clearly intimated that a judgment against a so-called "interstate" corporation was binding upon it as a whole.

In *Horne* v. *B. & M. R.R. Co.*, 18 Fed. Rep. 50, the court held that the Boston & Maine Railroad Company, a corporation chartered both in Massachusetts and New Hampshire, could be sued in New Hampshire as a citizen of that state for personal injuries inflicted in Massachusetts. Judge Lowell in his opinion said:

> "I will only add that the fiction which makes two or three corporations out of what is, in fact, one, is established only for the purpose of giving each state its legitimate control over the charters which it grants, and that the acts and neglects of the corporation are done by it as a whole. It is immaterial, in considering the question of jurisdiction, that the damage complained of was suffered within the limits of Massachusetts, and that the judgment will bind the corporation in that state." p. 52.

In *Nashua & L. R.R. Co.* v. *Boston & L. R.R. Co.*, 19 Fed. Rep. 804, the court said that in the case of such a consolidated corporation each of the entities, when properly sued, represented all.

In *Burger* v. *Grand Rapids & I. R.R. Co.*, 22 Fed. Rep. 561, 564, the court said that a judgment against the corporation described as organized under the laws of one of the states creating it would be binding and enforceable against it as a corporation of the other.

Where a corporation was organized both in New York and Pennsylvania, it was held that a judgment recovered against it in the former state as a corporation of that state could be sued upon in the latter in an action against it as a corporation of the latter and could not be collaterally impeached. *Union Trust Co.* v. *Rochester & P. R.R. Co.*, 29 Fed. Rep. 609.

The case of *Louisville N. A. & C. Ry. Co.* v. *Louisville Trust Co.*, 174 U. S. 552, is not inconsistent with these decisions, or with the principles contended for. In that case a corporation describing itself as a corporation of Indiana brought suit against citizens of Kentucky to cancel a guaranty purporting to be made by it on certain bonds, alleging that the guaranty was made without authority of law The defendants by answer (75 Fed. Rep. 433) alleged that the plaintiff was a citizen of Kentucky, and that, therefore, the court had no jurisdiction, and that the guaranty was duly authorized by law. It appeared that in 1873 the plaintiff railroad corporation was organized in Indiana. In 1880 an act was passed in Kentucky enacting that the plaintiff described as a corporation organized in Indiana be constituted a corporation. In 1881 the plaintiff corporation and an Illinois corporation consolidated pursuant to the laws of those two states. In 1882 the legislature of Kentucky by amendment of its act of 1880 authorized the corporation therein named to guarantee bonds of railroads constructed in Kentucky. In 1888 an agreement was made between the Ohio Valley Improvement Company and the Louisville, New Albany and Chicago Railway Company, a

corporation organized and existing under the laws of the states of Indiana and Kentucky, pursuant to which the guaranty in question was given.

The Circuit Court and Circuit Court of Appeals upheld the jurisdiction of the federal court. The Circuit Court (69 Fed. Rep. 431) held that the validity of the guaranty was to be determined by the law of Indiana, and that the guaranty was invalid for failure to comply with the requirements of that law. The Circuit Court of Appeals (75 Fed. Rep. 433) held that by the law of Kentucky the guaranty was valid, but that the plaintiff as a corporation of Indiana was not bound by the guaranty, and consequently that the bonds should be stamped with notice that the guaranty was binding only on the Railway Company "a corporation of Kentucky" and not binding on it "a corporation of Indiana and Illinois."

The case was brought before this court on a writ of *certiorari*. The court declined to consider whether the effect of the Kentucky statute was to create a corporation or not, on the ground that if such was its effect nevertheless the corporation having been first created in Indiana was "for the purposes of jurisdiction of the courts of the United States a citizen of Indiana." 174 U. S. 563. Upon the merits this court held that the Circuit Court of Appeals erred in undertaking to declare a liability against the Railway Company "a corporation of Kentucky." The court said:

> "Apart from the question whether it was a corporation of Kentucky, and from the difficulty of treating the negotiable guaranty upon each bond as itself divisible, binding the guarantor as a corporation of one State, and not binding it as a corporation of another State, there is an insurmountable objection to the decree in its present form.
>
> "The Louisville, New Albany and Chicago Railway Company is a party to this suit as a corpora-

> tion of Indiana only, and not as a corporation of Kentucky. It could not, either as a corporation of both States, or as a corporation of Kentucky only, have brought this suit against corporations and citizens of Kentucky in the Circuit Court of the United States for the District of Kentucky, without ousting the jurisdiction of the court." 174 U. S. 576.

The court decided as to jurisdiction only that a corporation which had originally been created in Indiana could sue as a citizen of that state whether it afterwards became a corporation under the laws of another state also or not. The court decided as to the merits only that a corporation which elected to sue as a corporation of one state only could not ask a determination of rights or liabilities that it might have under the statutes of another state granting it a charter. The court indeed said:

> "It necessarily follows that the rights and liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois, cannot be adjudicated in this case; and that the decrees, both of the Circuit Court and of the Circuit Court of Appeals, so far as regards the Louisville Banking Company, must be reversed, and the case remanded to the Circuit Court with directions . . . . that an injunction be issued against bringing suit upon the guaranty on these bonds against the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana, and that there be stamped on these bonds the following word: 'This guaranty is not binding on the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana, and is to that extent cancelled, without prejudice to the rights or liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois." 174 U. S. 577.

This language refers, however, only to the matter which was before the court. The real difficulty in the case was

the conflict of laws between Indiana and Kentucky. The plaintiff asserted its existence solely as a corporation organized under the laws of Indiana and sought to repudiate the guaranty as unauthorized by the franchise granted by that state. The defendants, on the other hand, asserted that as the charter granted by Kentucky authorized the guaranty the plaintiff was bound. Clearly, the Kentucky charter could not make valid in Indiana or as to property of the corporation in Indiana what by the laws of Indiana was invalid. Therefore, the plaintiff, so far as it was acting under its Indiana charter, was entitled to the relief prayed, and as it had invoked the aid of the court only in respect to its franchise in Indiana, by describing itself only as a corporation of that state the case called for no decision as to whether the guaranty could be effectual so far as the affairs of the corporation were regulated by the Kentucky charter, and this court accordingly modified the decree appealed from so far as it declared the existence of such a liability.

It is clear that the court intended to leave open the question whether a dual set of liabilities could exist. The decision was arrived at expressly apart from "the difficulty of treating the negotiable guaranty upon each bond as itself divisible, binding the guarantor as a corporation of one State, and not binding it as a corporation of another State." p. 576. If for purposes of contracting liabilities and determining rights two distinct corporations existed, there could be no difficulty in treating the guaranty as divisible.

While, therefore, by its language the court seems to deal with the case as a question of parties in the same manner as it might have done if instead of the corporation two natural persons were involved, the case called for no decision and the actual point decided by the court involved no doctrine that there were two entities for all purposes independent.

The case is of too exceptional a nature to warrant extending the decision of the court beyond the actual point involved. The individuals making up the body of stockholders had been granted franchises by two independent sovereignties. They had done an indivisible act in carrying out a single contract in making which they purported to act under both franchises. In law they were authorized to do this by the one franchise and not by the other. Clearly, a different rule may be applicable to such a case from the rule applicable to the ordinary case of rights and liabilities equally effectual under either franchise. The question of what rule should be applied this court declined to decide. The relief asked by the plaintiff called for no such decision; had it required a decision of this point the court must have decided the preliminary point which was expressly left open of whether the Kentucky statute amounted to a charter or only to a license to do business in the state.

In its ultimate analysis a corporation is the aggregation of individuals who compose it. The natural persons who are the stockholders bear its losses and subject to restrictions of limited liability are responsible for its obligations. The corporation is only the fictitious entity representing the franchise given to the individuals enabling them the more conveniently and the more safely to conduct their affairs. Where the same individuals are incorporated in each of two states to carry out the same enterprise, partly in the one state and partly in the other, and the organization in each state is identical, with a single capital stock, a single series of shares represented by a single set of certificates, identical officers chosen at a single election undistinguishable as an election under the laws of one state rather than of the other, there may for some purposes and as a convenient means of adjusting some rights be said to be two corporate entities, but it is

a mere meaningless splitting of hairs to describe the act of the stockholders collectively done in pursuance of all their franchises as separable. Whenever and wherever the question is one of procedure or of form or of determining the franchises that the corporation can exercise in a particular state, the fiction of a corporate entity replacing the stockholders in their collective capacity may conveniently and properly be used, but when a question of substantive rights is involved it becomes important to see that the fiction is not misused so as to produce a miscarriage of justice.

Speaking of such corporations, Mr. Morawetz says:

> "But although each charter of a company incorporated by different States can operate as a grant of franchises only within the jurisdiction of the State enacting it, yet the company itself does not on that account cease to be one company, having one undivided enterprise. A company thus constituted is in reality but a single corporation, formed by agreement of its members for the purpose of carrying on business in a corporate capacity in several States. . . . . For the purposes of acting, contracting, suing, and being sued, a company incorporated under the laws of several states is a single corporation, both in fact and in law." Morawetz on Private Corporations, 2d Ed. Sects. 995, 996.

The views thus expressed had already in substance been affirmed by this court in *Railroad Co.* v. *Harris*, 12 Wall. 65. The court there said that there was no reason why several states by appropriate legislation might not "unite in creating the same corporation or in combining several pre-existing corporations into a single one," or why one state might not "make a corporation of another State, as there organized and conducted, a corporation of its own." p. 82.

The theory of two separate corporations existing under the circumstances above described for purposes of action and enforcement of rights and liabilities is wholly inconsistent with the decisions of this court already referred to, as well as with any sound and reasonable administration of justice.

If there are two corporations, clearly both must act in order to bind the entire corporate property, and the action of each must be taken in the same way as if it were an independent corporation of the state by which it was created; yet this court decided that a single stockholders' meeting held in one state was sufficient authority for corporate action, and said it was immaterial whether by the laws of the other states stockholders of corporations must meet within the state or not.

Graham v. *Boston, Hartford & Erie R.R. Co.*, 118 U. S. 161.

If there are two corporations the defense of non-joinder of one would be good in a suit brought to enforce an obligation binding on the entire enterprise. Yet this court held that a suit could be maintained by one of the "dual corporations" without joining the other to enforce an obligation arising in the state by which the other was created.

Nashua & L. R.R. Co. v. *Boston & L. R.R. Co.*, 136 U. S. 356.

If there are two corporations both would be necessary parties to a foreclosure suit. Yet this court held that a foreclosure suit against the corporation as a corporation of one state only could be maintained and a foreclosure decreed of the property in both states.

Muller v. *Dows*, 94 U. S. 444.

In the very recent case of *St. Louis & San Francisco Ry. Co.* v. *James*, 161 U. S. 545, the question of liability where such a corporation was operating an interstate railroad was incidentally raised. The suggestion was made in a dissenting opinion that there were two corporations each of which was liable on the ground of partnership or agency. That, however, is obviously resorting to a fiction to avoid the difficulty created by a too liberal application of another fiction. Even if in cases of tort the liability which must admittedly exist might be based on such a theory, the application of the theory to contracts and contract liability involves insuperable difficulties.

The case at bar is a striking example of the practical necessity of adopting the principles above laid down. The mortgage out of which the present litigation arose was made by the Alabama and Georgia Manufacturing Company with no designation of the place of its incorporation, and purported to convey all the property in Georgia and in Alabama. It was executed in behalf of the corporation by officers who were the only officers of the corporation whether an organization of Alabama or of Georgia. Either the persons who so executed the mortgage, the same persons who are contesting the present suit, intended that it should be and believed that it was the act of the owner of the property, or they perpetrated a deliberate and intentional fraud on the bondholder to which they now ask this court to give effect.

If by a single act the officers bound the corporation both as an Alabama and as a Georgia corporation, it is a senseless distinction to insist that the single obligation can be enforced only by a separate proceeding against each of the supposed legal entities, proceedings which would be begun by service upon and be resisted by the same individuals in each case, the officers of the dual

corporation, and would affect the interests of the same persons in each case, the common body of stockholders, and would be paid for from a common treasury.

A very slight consideration shows the impracticable nature of any theory of divisibility. A single business is carried on under a single name, by a single management and body of officers. Debts are contracted and credits accrue. If a judgment is recovered against the corporation described as organized in one state and is not binding upon it as an organization of the other, how is it to be determined if an attempt is made to obtain satisfaction from debts due to the corporation, whether such debts are due to it in one capacity or the other? No theory of partnership or agency will avail, because a judgment against a single partner is not to be satisfied from partnership property, nor is a judgment against a principal to be satisfied from the property of his agent though the agent might also be liable on the same cause of action.

Examples of the confusion arising from such a doctrine might be multiplied indefinitely. The only possible solution of the problem is to recognize what is the truth, that where there is in fact a single real body there is in law also a single entity so far as rights, liabilities and their enforcement are concerned; that for special purposes it is proper and desirable to distinguish as to the place of creation of the corporation, but that whatever binds the individuals making up the body of stockholders in their collective capacity as a corporation of one state is equally binding upon them in their collective capacity as a corporation of the other state.

II.

The cases as to the jurisdiction of the Federal Courts depend upon a wholly distinct question from that here under consideration.

Much reliance has been put by the respondents, and apparently by the judges of the Circuit Court of Appeals, on the decisions of this court relating to federal jurisdiction of suits by or against so-called interstate corporations. Those cases have no bearing on the present question.

The position of such a corporation as to jurisdiction of a federal court appears first to have arisen in the case of *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black 286. There a corporation which had been chartered by the state of Indiana, and also by the state of Ohio sued a citizen of Indiana in the Circuit Court of the United States for the District of Indiana. The defendant objected to the jurisdiction on the ground that the plaintiff was also a citizen of Indiana. The objection was sustained. Chief Justice Taney adverted to the rule then recently established that in suits by and against corporations all stockholders were for purposes of determining the jurisdiction of the federal courts conclusively presumed to be citizens of the state by which the corporation was chartered and said that in the application of this rule to the case of a corporation chartered alike by two states the fictitious legal entity created by the state in which the proceeding was brought could alone be recognized. In the course of his opinion the learned Chief Justice said:

> "But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers. The

President and Directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States." 1 Black 297, 298.

Dissociated from the facts of the case this language might seem to imply the existence of two corporations distinct for all purposes. But it cannot fairly be given any such extensive meaning. It is not true that a corporation does not exist as a legal entity outside the state of its creation. On the contrary, it is settled law in this court that in the absence of an express prohibition the existence of a corporation created by one state will by the general law of comity prevailing among the states of the Union be recognized in every other state.

Railroad Co. v. *Harris*, 12 Wall. 65, 81–83.
Cowell v. *Springs Co.*, 100 U. S. 55.
Christian Union v. *Yount*, 101 U. S. 352.

Had the Ohio & Mississippi Railroad Company been organized only under the laws of Ohio it could have maintained its action. Clearly, the Chief Justice by the language quoted meant no more than that a corporation having an existence under the laws of Indiana could not, for the purpose of maintaining an action in the Circuit Court of the United States in Indiana, rely upon the charter granted to it in Ohio and disregard its existence under the law of Indiana. This is the view of the case taken by this court in later decisions.

Since the decision above referred to this court has had frequent occasion to consider the position, as to jurisdiction of the federal courts, of corporations chartered by more than one state.

Distinguishing between cases where there has been an actual incorporation in more than one state, and cases in which a corporation of one state has been granted authority to operate in another, even though coupled with a statutory declaration that by so doing it became a domestic corporation of the state granting such authority, this court has held that in the latter class of cases the corporation was everywhere and for all purposes a corporation of the state granting the original charter.

Railroad Co. v. *Harris*, 12 Wall. 65.
Goodlett v. *Louisville & N. R.R. Co.*, 122 U.S. 391.
Martin's Adm. v. *B. & O. R.R. Co.*, 151 U.S. 673.
St. L. & St. F. Ry. Co. v. *James*, 161 U. S. 545.
St. J. & Gr. I. R.R. Co. v. *Steele*, 167 U. S. 659.
Southern Ry. Co. v. *Allison*, 190 U. S. 326.

And that in the former class of cases, where there were really two incorporations, the corporation was for jurisdictional purposes to be deemed a corporation of that one of the chartering states in which it was sued.

Railway Co. v. *Whitton*, 13 Wall. 270.
Memphis & C. R.R. Co. v. *Alabama*, 107 U. S. 581.
Pennsylvania R.R. Co. v. *St. Louis, A. & T. H. R.R. Co.*, 118 U. S. 290.

In *Louisville N. A. & C. Ry. Co.* v. *Louisville Trust Co.*, 174 U. S. 552, already discussed at length, this court held that a railroad corporation originally chartered in Indiana could sue in the Circuit Court of the United States for the District of Kentucky, although a subsequent act of Kentucky purported to make it also a corporation of Kentucky. This was put upon the ground that the original charter in Indiana could not be affected by the subse-

quent act of the Kentucky legislature, whether that act created a corporation or merely conferred powers upon an existing foreign corporation—a question of construction that the court deemed it unnecessary to decide.

In *Nashua & L. R.R. Co.* v. *Boston & L. R.R. Co.*, 136 U. S. 356, this court held in like manner that a corporation first chartered in New Hampshire could, notwithstanding a subsequent incorporation in Massachusetts, sue as a citizen of New Hampshire in the Circuit Court of the United States for the District of Massachusetts.

Both of the foregoing cases appear to go upon the ground that a corporation having been formed under the laws of a state, the subsequent act of another state cannot limit the privilege of the corporation to deem itself a citizen for jurisdictional purposes of the state of its origin. If for jurisdictional or any other purposes this involved saying that there existed another distinct legal entity having independent rights, very anomalous and unsatisfactory results must follow.

A corporation created by the laws of a state is deemed a citizen of that state for purposes of jurisdiction by a legal fiction according to which all its stockholders are conclusively presumed to be citizens of that state. If the same persons have been created a corporation by the laws of two states, and two entities are to be recognized at the same time, this fiction would involve making both corporations parties and conclusively presuming in one proceeding that the same persons were citizens of each of two states. Some rule is necessary to avoid this anomaly. The requirement is met by recognizing, for purposes of jurisdiction, two separate entities, but refusing to recognize more than one of the two in any one proceeding. In the Nashua case this court adopted that course, refusing to sustain the objection taken that there was a Massachusetts corporation which must be joined.

In determining of what state such a dual corporation shall in any particular proceeding be deemed a citizen, the main consideration really is to secure a proper distribution of jurisdiction between the states which have created the corporation, and proper control by each state over the charter it has granted. Obviously, this will best be accomplished by recognizing for jurisdictional purpose in a proceeding against the corporation in either state only the entity created by that state. The rule apparently established by this court, as to the effect of priority of creation by one state as authorizing the corporation as a plaintiff to claim recognition as a citizen of that state, does not conflict with the general principles established by the other cases.

III.

It is immaterial whether the charter of the Alabama and Georgia Manufacturing Company expired before the foreclosure decree was rendered or not.

The decree having been rendered without objection cannot be attacked collaterally on this ground.

Assuming that the Alabama and Georgia Manufacturing Company was a party to the foreclosure suit only in its capacity as a corporation of Georgia, so that the expiration of its Georgia charter had the effect of a dissolution of the corporation that was a party to the suit, the decree was none the less valid against collateral attack.

The dissolution of a corporation pending a suit can have no greater effect in invalidating a decree than the death of a natural person under like circumstances. Mr. Justice Story, speaking of such a case, said:

> "Now I cannot distinguish between the case of a corporation and the case of a private person dying *pendente lite*."
>
> *Greeley* v. *Smith*, 3 Story 657, 658.

This statement was quoted with approval by Mr. Justice Field in *National Bank of Selma* v. *Colby*, 21 Wall. 609, 615.

If an individual defendant dies *pendente lite* the suit abates, but if the death is not called to the attention of the court and a judgment or decree is entered against the deceased defendant that judgment or decree while it may be reversible for error upon proper proceedings is not void and cannot be attacked collaterally.

In *New Orleans* v. *Gaines's Administrator*, 138 U. S. 595, in a suit to recover from the city of New Orleans rents and profits for which it was liable, objection was taken to the effect of certain judgments recovered in prior proceedings against persons claiming under the city on the ground that the judgments were recovered after the death of the defendants. This court held that the judgments could not be collaterally attacked on this ground.

> "A judgment rendered after a defendant's death, without the plaintiff's fault, is not void. The irregularity or error may be cured by entering it *nunc pro tunc* of a date prior to the defendant's death; and even this has been held not necessary in a collateral proceeding." 138 U. S. 612.

Referring to the effect of delay in raising the question, Mr. Justice Bradley, speaking for the court said:

> "But it does not lie in the mouth of the city of New Orleans to raise the question, at the present stage of the case, after the decree passed by the Circuit Court and an appeal to this court, and a remand of the cause to the Circuit Court for further proceedings, during all which time this objection could have been made, but never was made until the matter came before the master on the last reference. We think that the appellant was estopped from raising the objection, and that it cannot be urged now." 138 U. S. 612.

Certainly in the present case there is every ground for such an estoppel as the persons acting for the corporation, now alleged to have been defunct, continued to take part in the proceedings after March 21, 1896, the date of the expiration of its charter. The same corporation, now alleged to have gone out of existence, joined in the petition for appeal filed December 2, 1898 (Rec. p. 452), in the assignment of errors (Rec. p. 453) and in the bond (Rec. p. 470), and after the final decision of the Circuit Court of Appeals joined in an application to this court for a writ of *certiorari*, which was denied (175 U. S. 726), and later in an appeal which was dismissed (184 U. S. 297).

In *Reid* v. *Holmes*, 127 Mass. 326, the same doctrine as to the effect of a judgment entered after the decease, *pendente lite*, of a defendant was laid down.

See also:

Bridges v. *Smyth*, 8 Bing. 29.
Yaple v. *Titus*, 41 Pa. St. 195.

The same principle applies where a plaintiff dies.

Powell v. *Washington*, 15 Ala. 803.

Cases in which the action was begun after the death of the defendant are of course wholly different. The court in such a case never acquires jurisdiction, and all the proceedings are a nullity.

In *Reid* v. *Holmes*, 127 Mass. 326, the late Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts, said:

> "The case is wholly different from that of a judgment rendered in an action originally brought against a person already dead, or of a decree granting administration on the estate of a living person; for in each of those cases the court never acquired jurisdiction." 127 Mass. 328, 329.

EIGHTH.

NO EVIDENCE WAS NECESSARY TO JUSTIFY THE COURT IN ENTERING THE DECREE.

I.

No material issue of fact was raised by the answer.

The answer filed by the defendants, now the appellees (Rec. p. 505), alleged:

first, that bringing the Alabama suit was not a contempt of court; that the defendants were corporations of Alabama, and the Alabama and Georgia Company also a corporation of Georgia, but without any merger by action of the two states; that the Alabama and Georgia Company as a Georgia corporation only was made a party to the foreclosure suit; that as matter of law the foreclosure decree was not conclusive on them by reason of the citizenship alleged and because part or all the property was in Alabama;

second, that the court had no jurisdiction because the bill was not in fact ancillary, and there was not the necessary diversity of citizenship, and the forcelosure suit was not still pending in the court;

third, that the suit was barred by the United States Revised Statutes, Section 720;

fourth, that the plaintiff, the present appellant, had appeared and answered in the Alabama suit before filing the bill in this suit;

fifth, that the Circuit Court had no jurisdiction of the original foreclosure suit because the plaintiff therein and the Huguley Company were both citizens of Alabama;

sixth, that the Circuit Court had no jurisdiction to make a sale of the mortgaged property because the Huguley Company was a corporation of Alabama and the charter in Georgia of the Alabama and Georgia Company expired before the decree was made;

seventh, that the court had no jurisdiction to make the sale because all the mortgaged property was in Alabama;

eighth, that the court had no jurisdiction to make a sale of so much of the mortgaged property as was in Alabama, and that part of it at any rate was there situated;

ninth, that the Alabama and Georgia Company was chartered in Alabama and also received a charter in Georgia which expired March 21, 1896; that the Huguley Company is a corporation of Alabama; that these two corporations are the plaintiffs in the Alabama suit; that the Alabama suit was at the regular term of that court held on June 10, 1901, submitted without knowledge of any order in this proceeding to the decision of that court on demurrers;

tenth, that the Alabama suit seeks an accounting, but the plaintiffs therein expect to credit any sums paid in under the accounting in the Georgia suit; that the Alabama suit was instituted in good faith and not to annoy or unnecessarily to prolong the litigation.

The only matters of fact contained in these allegations are the place of incorporation of the two companies, the appearance and pleading of the present appellant in the Alabama suit, the expiration of the Georgia charter of the Alabama and Georgia Company on March 26, 1896, the location of all or a part of the mortgaged property in Alabama, the submission of the Alabama suit on demurrers without knowledge of any order having been made in this suit, the intention of the plaintiffs in the

Alabama suit to allow credit for sums allowed them in the accounting in Georgia. All the other substantial allegations of the answer are merely conclusions of law or statements of evidence.

None of the facts alleged constitute any defence or raise any material issue.

(1) It has already been shown that wherever the Huguley Company was incorporated it was a party to and bound by the decree in the foreclosure suit. No question of dual corporations arises as to it.

(2) The facts as to the incorporation of the Alabama and Georgia Company are equally immaterial. If, as has been argued, the decree was binding on that corporation as a corporation of both states, the dual incorporation is not material. If not so binding, yet as the Alabama and Georgia Company had no interest in the foreclosure of the equity of redemption, and consequently no interest in the Alabama suit or in this suit, the fact is immaterial, and the suit is equally maintainable at least against the Huguley Company.

(3) The appearance and pleading of the present appellant in the Alabama suit and the alleged submission of the case on demurrers does not prevent the maintenance of this suit. It is not alleged and cannot be inferred that this appellant joined in any submission of the case even if that would be material. There is no principle of law by which the appellant was bound to invoke the assistance of the Circuit Court before appearing or pleading in the Alabama suit. The application to the Circuit Court was not a removal or governed by the statutes relating to the removal of suits.

In *French* v. *Hay*, 22 Wall. 250, the ancillary suit was brought after a judgment in the suit sought to be restrained had been recovered and the case taken to the

Supreme Court of Pennsylvania. In *Dietzsch* v. *Huidekoper*, 103 U. S. 494, the ancillary suit was brought to prevent enforcement of a replevin bond, proceedings on which were being taken as the result of a judgment recovered in a state court.

(4) The location of all or a part of the real estate in Alabama is not material. It has already been shown that the Circuit Court for the Northern District of Georgia could foreclose the mortgage as to property partly or wholly in Alabama. It was alleged in the original foreclosure suit that the property of the Alabama and Georgia Company was conveyed to the trustees for the bondholders by deed of trust made part of the bill (Rec. p. 2). The deed of trust described a part of the property as in Georgia and a part as in Alabama. (Rec. p. 4.) The answer contained no denial of the propriety of this description of the property; no allegation that the property was exclusively in Alabama. It has already been shown that the Huguley Company at least cannot now be heard to allege that the property was wholly in Alabama for the purpose of attacking the jurisdiction of the court. The original foreclosure bill contained allegations which if true gave the court jurisdiction; these allegations were not denied. Having submitted to the jurisdiction of the court in a suit of which on the face of the bill the court had jurisdiction the Huguley Company could not collaterally attack for want of jurisdiction of the subject matter the decree rendered.

(5) The intention of the defendants in this suit to give proper credits upon an accounting in the Alabama suit is of course not a defence and not a material or issuable allegation.

II.

The decree could properly be entered on a hearing upon bill and answer.

The bill of complaint had annexed as an exhibit made part of the bill a copy of the bill filed in the Alabama court (Rec. pp. 478, 486). The bill also stated that the proceedings in the foreclosure suit appeared on the records of the court "which are hereby referred to and made a part of this bill of complaint, with leave to refer thereto as often as may be necessary." (Rec. p. 478.) The answer had annexed to it a copy of the answer filed in the Alabama state court and sundry other exhibits.

On hearing upon bill and answer no evidence is required. All facts in the bill properly pleaded and not put in issue by the answer are taken to be true, and all facts in the answer properly pleaded are taken to be true.

In the case of *In re Sanford Fork and Tool Company*, 160 U. S. 247, Mr. Justice Gray delivering the opinion of the court enumerated the courses open to a plaintiff in equity on the coming in of the defendant's answer and described one of those courses as follows:

> "Fourth. A demurrer to the answer is unknown in equity practice. But the plaintiff may set down the case for hearing upon bill and answer; whereupon all the facts alleged in the bill and not denied in the answer, as well as all new facts alleged in the answer, are deemed admitted, as upon a demurrer to an answer in an action at law." 160 U. S. 257.

This admission does not of course extend to conclusions of law pleaded either in the bill or answer, any more than an admission by demurrer.

Dillon v. *Barnard*, 21 Wall. 430, 437.

Upon a hearing of this cause on bill and answer the court had before it everything that was necessary to dispose of the case. It has been shown that the only facts denied by the answer and the only new facts alleged in the answer were immaterial. The substantial allegations of the bill, with the record in the foreclosure suit which constituted a part of the bill through incorporation therein by reference as well as by reason of the ancillary nature of the proceedings, set forth everything required to support the plaintiff's case. Since none of those facts material to the case were denied, no proof was required and the Circuit Court rightly entered its decree.

NINTH.

IF AND SO FAR AS ANY EVIDENCE WAS REQUIRED THERE WAS SUFFICIENT BEFORE THE COURT TO UPHOLD THE DECREE.

I.

All the facts alleged in the bill necessary to uphold the decree, not expressly admitted, were contained in the record of the foreclosure suit.

If it is to be taken that the cause was not heard on bill and answer but on proofs, then the court was equally justified in entering the decree because there was evidence before it, in the record of the foreclosure suit, establishing all facts alleged in the bill and not expressly or impliedly admitted by the answer.

The essential allegations of the bill were: the bringing of the foreclosure suit, the proceedings had therein and

the result; the bringing of the suit in the state court of Alabama; the identity of the defendants in the foreclosure suit and of the plaintiffs in the state court.

The record of the foreclosure suit contains all the facts as to the bringing of that suit, the pleadings therein, and its termination.

The bill in this suit has annexed to and made a part of it (Rec. p. 478) a copy, Exhibit B, (Rec. p. 486) of the bill in the Alabama court. The answer in this suit contains no denial of the allegations of the bill as to the Alabama suit, but impliedly, at least, admits the bringing of the suit in Alabama, and annexes a copy of the answer filed in that suit (Rec. p. 510). The plaintiff could not be required therefore, to produce any evidence as to the proceedings in Alabama.

The answer filed to the present bill establishes the relation of the Huguley Manufacturing Company to the preceding litigation. The first paragraph of the answer sets up that "said Huguley Manufacturing Company" was alleged in the foreclosure suit to be a corporation created under the laws of Georgia, but that it was in fact incorporated only in Alabama. (Rec. p. 505.) The fifth paragraph sets up want of jurisdiction in the foreclosure suit because the Huguley Manufacturing Company was a corporation of Alabama, and, therefore, a citizen of the same state as the plaintiff in the foreclosure suit (Rec. 507). The sixth paragraph (Rec. p. 508) sets out in detail the position of the defendants, viz: that the Alabama and Georgia Company is a corporation to which a charter was granted by both Georgia and Alabama, and the Huguley Company a corporation organized only in Alabama, and that in the foreclosure suit the Alabama and Georgia Company was sued as a corporation of Georgia, and the Huguley Company, there being according to the answer only one such corporation, was sued

under the designation of a corporation of Georgia. These allegations can have no other meaning than that the Huguley Company now before the court, and a plaintiff in the Alabama suit, was before the Circuit Court in the original foreclosure suit, but was then misdescribed as a corporation organized under the laws of Georgia. To whatever benefit can be derived from the legal effect of such misdescription the defendants are entitled, but no question of fact is involved. The case is to be disposed of on the basis that this allegation as to the Huguley Company is true.

The present bill expressly alleges in the first paragraph (Rec. p. 473) that the Alabama and Georgia Company consists of a single body of stockholders and officers engaged in carrying on a single enterprise, if organized under the laws of both Georgia and Alabama. The answer does not profess to controvert this position, but merely alleges, a conclusion of law, that by reason of such double incorporation there are two legal entities and that the proceedings in the foreclosure suit to which one was a party in no wise affect the other. If any proof was required that there is but a single body of stockholders engaged in a single enterprise, the record in the foreclosure suit and in this suit furnishes such evidence.

II.

The record in the foreclosure suit before the court was competent evidence.

It has already been shown that the record in the foreclosure suit was in fact incorporated by reference in the bill and being in no wise controverted must be given the same effect as if set forth at large.

Assuming, however, that the record is to be treated as a proof, the result is the same. The bill was filed as an

ancillary proceeding and was in fact a part of or a continuation of the original foreclosure suit. Clearly, then, the record in that suit was properly before the court for all evidential purposes in this suit.

Aside from this, however, the record was competent evidence against the Huguley Company. It sufficiently appears, and indeed is admitted, as has been shown, that the Huguley Company defendant in this suit and the Huguley Company defendant in the foreclosure suit are identical. The record in the foreclosure suit constitutes, therefore, an adjudication against the Huguley Company of everything that was there in issue or might have been in issue. The plaintiff as purchaser of the property sold in that suit was a privy and so far a party as to be bound by the proceedings, and the adjudication is equally binding in his favor.

See *Blossom* v. *Railroad Co.*, 1 Wall. 655.
Kneeland v. *Am. L. & T. Co.*, 136 U. S. 89.
Central Nat. Bk. v. *Hazard*, 30 Fed. Rep. 484.
Gunn v. *Wades*, 62 Ga. 20.
Shirley v. *Fearne*, 33 Miss. 653.

Finally, it is not necessary to rely upon the record in the foreclosure suit as a binding adjudication to support the present bill. The record in the foreclosure suit was evidence in favor of any person in any controversy in which the facts were material, to prove that a bill was brought and that the successive proceedings shown by the record were had. The identity of the defendant in the proceedings shown by such record and the defendant in the present suit appears sufficiently to show that the proceedings of the court relate to the present defendant. It will appear from a consideration of the bill in the present suit that these proceedings are the only facts for

proof of which it is necessary, if indeed any such necessity exists, to rely upon the record in the foreclosure suit as evidence.

The allegations of the bill may be classified and described as follows:

Paragraph I of the bill (Rec. p. 473) alleges:
the place of incorporation of the defendants and the identity of the dual corporations, if any, the citizenship of the corporations and the description of the property owned by them.

All allegations of citizenship are immaterial except to identify the corporations, because the bill is ancillary; all allegations as to the dual incorporation, including identity of officers, etc., are inapplicable to the Huguley Company, and as to the Alabama and Georgia Company are not denied by the defendants; the property is described in the bill in the Alabama suit (Rec. p. 486) and this description is identical with the description in the original foreclosure bill (Rec. pp. 2, 5).

Paragraph II of the bill (Rec. p. 474) alleges:
(a) execution of the mortgage, indivisible character of the property, acquisition of title to equity by the Huguley Company, adverse interest of W. T. Huguley and death of Yancey;

(b) default in the condition of the mortgage, filing of the foreclosure bill, service of process, and decree *pro confesso* against W. T. Huguley.

The execution of the mortgage, acquisition of title by the Huguley Company to the equity of redemption and death of Yancey are common ground; the Alabama suit asserts and is founded on the mortgage and acquisition of title to the equity of redemption and alleges the death of Yancey (Rec. pp. 487, 488).

The adverse interest of W. T. Huguley is immaterial, because wrongly joining him as a defendant is at most only error and does not impeach the decree. It is immaterial in this proceeding whether there was a default in the mortgage or not, since there was a decree ordering a sale and it is the title under the decree that the court is to protect; the decree would not be void if there had been no default; therefore, any attack upon the title under the decree on the ground that there was no default must be by direct proceedings in the court rendering the decree.

Paragraph III of the bill (Rec. p. 475) alleges:
proceedings had in the foreclosure suit.

The fact of such proceedings is properly proved by the record and by that only.

Paragraph IV of the bill (Rec. p. 476) alleges:
proceedings had in the foreclosure suit.

The fact of such proceedings is properly proved by the record and by that only.

Paragraph V of the bill (Rec. p. 477) alleges:
that the proceedings appear by the records of the court and refers to the records.

Paragraph VI of the bill (Rec. p. 478) alleges:
the bringing of the suit in Alabama as shown by a copy of the bill in that suit, annexed and referred to, and the nature and object of that bill.

The answer admits the bringing of the suit in Alabama and attaches a copy of the answer filed in that suit. The precise terms of the bill are shown by copy annexed as an exhibit.

Paragraph VII of the bill (Rec. p. 479) alleges:
that the issues which it is sought to raise in the Alabama suit have been or could have been determined in the foreclosure suit.

This is a matter shown by inspection of the record in the foreclosure suit and the bill and answer in the Alabama suit (Rec. pp. 486, 510).

Paragraph VIII of the bill (Rec. p. 479) alleges:

> that part of the mortgaged property was situated in Georgia and part in Alabama, that the Circuit Court had jurisdiction to foreclose all, that no question of jurisdiction was raised in the foreclosure suit, that the Alabama suit is an attempt to relitigate the subject matter of the foreclosure suit and is an improper suit and in violation of the plaintiff's rights as a purchaser, is an attack on the validity of the decree of the Circuit Court, that the plaintiff is entitled to relief by an ancillary suit and that the defendants are represented in the Alabama suit by the same counsel as in the foreclosure suit.

The first allegation it has been shown is not material; the jurisdiction of the Circuit Court and all the other allegations are either conclusions of law or matters determined by an inspection of the record.

It appears from this analysis of the bill that it contains no allegations dependent for proof on the record in the foreclosure suit, of which that record is not competent evidence as against all the world, and no material allegations not sufficiently proved by the record.

III.

If the answer showed any affirmative defence no evidence was necessary to defeat it.

So far as the answer in the present suit denied any allegations in the bill, it has been shown that those allegations were not material even if they were not sufficiently proved by the record in the foreclosure suit. So far as

the answer contained any allegations designed to establish an affirmative defence those allegations were not supported by evidence.

No evidence appears to have been introduced by the defendants (Rec. p. 539). Affirmative allegations in an answer must be supported by proof.

Clarke v. *White*, 12 Pet. 178, 190.
Seitz v. *Mitchell*, 94 U. S. 580.

An answer on oath so far as it gives discovery is evidence in the defendant's favor, because the plaintiff has called for discovery, but so far as the answer introduces new matter the reason does not apply.

Farley v. *Kittson*, 120 U. S. 303, 317.

See also:

Gordon v. *Bell*, 50 Ala. 213.

TENTH.

THE BILL STATED A CLEAR CASE OF JURISDICTION IN EQUITY.

If the Circuit Court had jurisdiction to protect and give effect to its decree rendered in the foreclosure suit, then clearly the bill was within the jurisdiction in equity of the court.

The only possible remedy for the matters set forth in the bill of complaint was by injunction. The possibility of setting up in the Alabama suit the record in the foreclosure suit as a bar is no answer because by the hypothesis the plaintiff in the present suit had a right to

seek relief in the court by which the foreclosure was decreed, and the court which issued the foreclosure decree had a right by ancillary proceedings to protect the title desired therefrom and to give effect to that decree.

The jurisdiction of the Circuit Court over the subject matter of the suit as a proceeding ancillary to the foreclosure carries with it jurisdiction in equity as the only remedy possible. All the cases affirming the existence of jurisdiction over such ancillary proceedings tacitly affirm the existence of jurisdiction in equity.

Dunn v. *Clarke*, 8 Peter 1.
French v. *Hay*, 22 Wall. 250.
Dietzsch v. *Huidekoper*, 103 U. S. 494.
Root v. *Woolworth*, 150 U. S. 401.
Julian v. *Central Tr. Co.*, 193 U. S. 93.

ELEVENTH.

IF THERE WERE ANY IRREGULARITIES OF PROCEDURE THEY WERE WAIVED.

Objection has been suggested to the proceedings in the Circuit Court on the ground that there was no answer filed to the bill which should, therefore, have been taken *pro confesso*, and on the ground that if there was an answer there was no replication.

The case was submitted in the Circuit Court upon the "bill and proceedings in this cause ancillary to the proceedings in the cause lately pending in this court of J. J. Robinson as trustee, etc., against Alabama & Georgia Manufacturing Company, et al., and upon the record in said last-named cause" (Rec. p. 539). A motion had been made several months before to strike out "the answer

filed by the defendants." (Rec. p. 538.) No objection appears to have been taken by the defendants to such submission or hearing.

It is too late to object that the "Answer to Bill and Response to Rule to Show Cause" (Rec. p. 505) was not an answer to the bill. The respondents made no objection to its being treated as such for the purpose of letting the case be heard upon the merits, and in assigning errors on their appeal to the Circuit Court of Appeals expressly described it as their answer to the bill. The eighth assignment of error (Rec. p. 544) was that there was no evidence or proof to support the relief asked for, and that the decree was "rendered upon said alleged ancillary bill and the answer of respondents thereto." An enumeration follows of matters set up in the bill "which were not admitted in the answer of respondents and which were put in issue by the answer of respondents." (Rec. p. 544.)

After going to a hearing upon the bill and answer and record in the foreclosure suit, and taking an appeal expressly recognizing that they had answered the bill, the defendants cannot now deny that the paper filed was an answer.

The respondents are equally precluded from objecting that no replication was filed. If the hearing is deemed to have been upon bill and answer no replication was necessary or proper.

Reynolds v. *Crawfordsville Bank*, 112 U. S. 405.

If the hearing was upon proofs then proceeding to the hearing was a waiver of the want of a replication.

National Bank v. *Insurance Co.*, 104 U. S. 54.

No objection was taken in the Circuit Court or in the errors assigned upon the appeal to the Circuit Court of Appeals on this ground. The objection cannot be taken for the first time in the appellate court.

Clements v. *Moore*, 6 Wall. 299.
Fretz v. *Stover*, 22 Wall. 198.

TWELFTH.

THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF GEORGIA HAD JURISDICTION OVER THE PERSONS OF THE APPELLEES.

I.

Appearing and proceeding otherwise than for the sole purpose of objecting to the sufficiency of the service is a waiver of any defect of service.

Jurisdiction of the subject matter of a suit is dependent upon the powers conferred upon the court. Jurisdiction of the person of a defendant is obtained by service of process or by the voluntary appearance of the defendant in the progress of the cause.

Cooper v. *Reynolds*, 10 Wall. 308, 316.
Rothschild v. *Knight*, 176 Mass. 48, 55.

A voluntary appearance is a waiver of any lack of service or defect in the service or in the venue. Such objections are personal privileges which the defendant may waive, and if he appears to the action he places himself in precisely the same position as if process had been served upon him.

Pollard v. *Dwight*, 4 Cranch 421, 428.
Loomis v. *Wadhams*, 8 Gray 557.

An objection to the jurisdiction for want of service is an objection that must be made at the outset. The defendant cannot, knowing the fact as to defective service, permit the cause to proceed and subsequently raise the objection.

Brown v. *Webber*, 6 Cush. 560, 564.

In *Voorhees* v. *The Bank of the United States*, 10 Peters 449, 473, this court said:

> "It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted."

If the defendant, not having been legally served so as to be brought into court, sees fit to plead to the merits of the case, or to take any step which invokes the jurisdiction as to any relief that the court can afford, other than a determination of the sufficiency of the process by which it is sought to make him appear, he submits to the jurisdiction for all purposes and cannot thereafter say that he was not properly brought before the court. It is not sufficient that a defendant should object if he does not make his objection a part of the record,

Toland v. *Sprague*, 12 Peters 300, 331,

and it is not sufficient for him to make such objection and at the same time ask the judgment of the court on other objections to the maintenance of the suit going to the merits. If indeed his objection to the court's jurisdiction over his person is overruled, he may proceed to

defend the case on the merits and may by appropriate proceedings save his right to have the judgment of the court as to the jurisdiction over his person reviewed.

Harkness v. *Hyde*, 98 U. S. 476.

The question of waiver is not a question of intention:

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended."
>
> *Wabash Western Railway* v. *Brow*, 164 U. S. 271, 278.

The rule is founded on the ground that if the defendant does any act consistent only with the court having jurisdiction over him he waives the right thereafter to deny that the court has such jurisdiction. By raising for the decision of the court any issue other than that of the sufficiency of the process or of the service of process, the defendant clearly does an act consistent only with the court having jurisdiction over him, since without such jurisdiction the court cannot decide the issue so raised. Whenever, therefore, a defendant by motion to dismiss for want of equity, by demurrer, plea, answer or otherwise, undertakes to set up any defence to a suit, even though in the same pleading he asserts lack of jurisdiction over his person, he waives the personal privilege of questioning the sufficiency of the means by which he has been brought into court.

Harkness v. *Hyde*, 98 U. S. 476.
Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98.

In *Fitzgerald Construction Co.* v. *Fitzgerald*, this court said:

> "By the amendment to its answer, its plea and motions, the defendant insisted that the court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service, and submitted itself to the decision of the court in respect to jurisdiction over the subject matter, which jurisdiction, it is entirely clear, the court possessed. These proceedings were taken by defendant after discovering the alleged ground of objection to the service and there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person." p. 106.

In *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127, the railway company, the defendant below, filed a demurrer on three grounds—want of jurisdiction of the person, want of jurisdiction of the subject matter, and failure to state a cause of action. This court dealing with the contention that the action had been brought in the wrong district said:

> "Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was, not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought." p. 130.

In like manner in sustaining the defendant's objection to the service in *Southern Pacific Company* v. *Denton*, 146 U. S. 202, this court emphasized the fact that the objection was taken by a demurrer "for the special and single purpose of objecting to the jurisdiction," and the defence on other grounds was made only after this demurrer had been overruled (p. 206).

The rule that filing a petition for removal in a state court does not waive a defect in the service of process is entirely consistent with these principles. Even though the petitioner does not in his petition expressly restrict the purpose of his appearance, there is no ground for saying that he appears generally or voluntarily submits to the jurisdiction of the court. The petition for removal is the means of exercising a statutory right—the right to have a federal court pass on all matters in controversy including the sufficiency of the service. "Moreover the petition does not invoke the aid of the court touching relief only grantable in the exercise of jurisdiction of the person."

Wabash Western Railway v. *Brow*, 164 U. S. 271, 278.

II.

The appellees appeared and proceeded in this suit without raising any objection to the sufficiency of the service.

The subpœna in the present suit was issued June 10, 1901, addressed to Alabama and Georgia Manufacturing Company, Huguley Manufacturing Company, John M. Chilton, and Welles, Bennett and Welles. On the same day an order was entered that the defendants named in the bill show cause on June 20th why an injunction should not issue, and that in the meantime they be restrained (Rec. pp. 500, 501).

The subpœna and order were served on W. H. Huguley and W. T. Huguley at West Point, Georgia (Rec. p. 501). An acknowledgment of service was also filed in the following form:

> "We accept service of the within notice and summons in lieu of service by the marshal, but reserving all right of objection to the jurisdiction." (Signed) "J. M. Chilton. Welles, Bennett & Welles, Solicitors." (Rec. p. 504.)

On June 21, 1901, (Rec. p. 535) there was filed in the clerk's office a paper headed: "Answer to Bill and Response to Rule to Show Cause" (Rec. p. 505) signed by "King & Spalding, J. M. Chilton, Welles, Bennett & Welles, Solicitors for Respondents" (Rec. p. 509). This paper is entitled in the suit, is addressed to the court and then reads:

> "Comes the Alabama & Georgia Manufacturing Co., and the Huguley Manufacturing Co., each a corporation under the laws of Alabama, John M. Chilton, and Welles, Bennett & Welles, a partnership, and for answer to an order of this court made and entered in the above entitled cause, requiring them to show cause on the 20th day of June, 1901, why the injunction should not be issued in said cause, says:" (Rec. p. 505.)

The answer then proceeds, first, to allege that the bringing of suit in Alabama was not a contempt of court, on the ground that as Alabama corporations the respondents were not bound by the foreclosure decree; second, to deny the jurisdiction of the court to grant an injunction on the ground that the original foreclosure suit was no longer pending in the court; third, to deny the jurisdiction of the court on the ground that an injunction would be in violation of United States Revised Statutes, section 720; fourth, to allege that the court ought to refuse jurisdiction

because the respondents in the Alabama suit had pleaded there; fifth, to deny jurisdiction on the ground that the court had no jurisdiction of the original foreclosure suit for lack of the requisite diversity of citizenship; sixth, to deny the jurisdiction of the court to make the foreclosure sale because the Huguley Company was chartered in Alabama and the Georgia charter of the Alabama and Georgia Company had expired before the sale; seventh, to deny the jurisdiction of the court to make the foreclosure sale on the ground that all the property was in Alabama; eighth, to deny the jurisdiction of the court to order a foreclosure sale of so much of the property as was in Alabama; ninth, to aver that the Alabama and Georgia Company and the Huguley Company, complainants in the Alabama suit, were Alabama corporations and were never parties as such to the foreclosure suit, and that the present plaintiff having pleaded in the Alabama suit could not invoke the protection of the court; tenth, to aver that the Alabama suit was brought in good faith and with intention that on redemption all proper credits should be allowed. The answer closed as follows:

> "Wherefore, these respondents pray that the rule against them be discharged, and that this court issue no other or further order or injunction in this cause, but that it dismiss said bill for want of jurisdiction of the persons and subject matter of said proceedings. And these respondents pray to be discharged with their reasonable costs in this behalf." (Rec. p. 509.)

This answer was sworn to by John M. Chilton and Frank L. Welles in Alabama, and was also sworn to in Georgia by William H. Huguley who also made oath "that he was the last acting president of the Alabama & Georgia Manufacturing Company, and as such makes

this affidavit," and by W. T. Huguley who also made oath "that he is the agent of the Huguley Manufacturing Company in the conduct of these proceedings." (Rec. pp. 509, 510).

On October 8, 1901, an injunction was issued as prayed for. On June 30, 1902, the plaintiff moved to strike the answer from the files as being no answer to the bill but so evasive as to be a delusion. On September 29, 1902, the case came on further to be heard, and was "submitted upon the bill and proceedings in this cause ancillary to the proceedings" in the foreclosure suit, and upon the record in the last named cause, and a final decree was entered (Rec. p. 539). No objection appears to have been made by the respondents to such hearing on the merits.

On March 21, 1903, the Alabama and Georgia Company and the Huguley Company petitioned that an appeal be allowed them to the Circuit Court of Appeals, from the final decree so entered (Rec. pp. 540, 541). This petition was duly signed by the "solicitor and attorney for appellants" and was allowed the same day. An assignment of errors was filed at the same time. The first error assigned was that the Circuit Court erred in not dismissing the bill "for want of jurisdiction of the subject matter and of the parties" (Rec. p. 543). Neither this nor any of the other errors specified appears to be founded on any defect in service of process. The case was heard in the Circuit Court of Appeals on October 15, 1903, and on January 12, 1904, the decree was reversed and the case remanded with directions that the bill be dismissed. (Rec. p. 550.) The opinion of the court (Rec. p. 551) contains no intimation that there was any lack of jurisdiction arising from defective service of process.

At no time in the course of the proceedings did the respondents assert that they had not been duly brought before the court by service of process. The acceptance of

service reserves only a right to object to the jurisdiction, not specifying any right to object to the sufficiency of service. The answer filed contained no statement that the respondents appeared specially and no reservation of rights to object to the sufficiency of service. The respondents at no time moved to dismiss for lack of jurisdiction acquired over them. The case was without objection heard on the merits. An appeal was taken and prosecuted without specifying that the respondents were only before the court for a limited purpose, and the case was decided by the Circuit Court of Appeals without any reference to an objection having been raised to the jurisdiction over the persons of the defendants.

The Circuit Court for the Northern District of Georgia could not have dismissed the bill as prayed in the answer filed by the respondents, on any ground put forward in that answer without deciding a question of fact or of law bearing upon the merits of the suit. That answer alleged as grounds for dismissal lack of jurisdiction of the subject matter in a variety of forms and for a variety of reasons, and alleged various grounds why the relief asked in the bill should not be granted. It nowhere alleged failure to bring the respondents into court. In *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127, this court said that a demurrer joining want of jurisdiction of the subject matter and failure to state a case, with want of jurisdiction of the person, as grounds for dismissal, waived the right to rely upon defective service; *a fortiori* a pleading alleging only want of jurisdiction of the subject matter and grounds of defence upon the merits waives that right.

Again, it appears that the respondents submitted to a hearing upon the merits without making any objection or by motion to dismiss or otherwise asking the judgment of the court whether they had properly been brought

before the court. This on the principles above considered could not but operate as a conclusive waiver.

Finally, in taking the case to the Circuit Court of Appeals the respondent sought no review of a decision made upon a preliminary objection to the jurisdiction over their persons, but appealing from a final decree assigned lack of jurisdiction of their persons in common with other grounds going to the merits as reasons for reversal. This would have waived their right to object even if it had up to that time been preserved.

THIRTEENTH.

THE COURT COULD NOT PROPERLY DISMISS THE BILL FOR WANT OF SERVICE.

I.

The case was one for substituted service.

The case set forth in the bill of complaint was against parties already before the court in the foreclosure suit. The present bill was ancillary to that suit according to its allegations. The court could and would in such a case make an order for substituted service.

Dunn v. *Clark*, 8 Peters 1.
Webb v. *Barnwall*, 116 U. S. 193.
Pike v. *Gregory*, 94 Fed. Rep. 373.

Had the respondents refused to appear at all or appeared specially and set up simply their objection to the manner of service upon them, the complainant might have asked for an order for substituted service. Failing to follow this course, even if the respondents did not so

waive their right to object to the service as to submit themselves for all purposes to the jurisdiction of the court, yet they could not have asked the court to dismiss the suit without giving an opportunity for an order for substituted sevice.

In *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633, this court said that in an ancillary suit "the court will proceed in the injunction suit without actual service of subpœna."

II.

If there was any defect the remedy was not to dismiss the bill, but to set aside the service.

The bill of complaint alleged that the corporations sued were both organized under the laws of Georgia, and were identical with the corporations of the same name sued in the foreclosure suit.

It further alleged that the only place of business either corporation had ever had was in Georgia.

The law of Georgia provides as to service of process on corporations:

> "Service of all subpœnas, writs, attachments and other process necessary to the commencement of any suit against any corporation in any court except as hereinafter provided may be perfected by serving any officer or agent of such corporation, or by leaving the same at the place of transacting the usual and ordinary public business of such corporation if any such place of business there shall be within the jurisdiction of the court in which said suit may be commenced." Georgia Code, Section 1899.

The answer filed shows by the affidavit of W. T. Huguley that he was the agent of the Huguley Company "in the conduct of these proceedings." (Rec. p. 510.)

If then the Huguley Company was, as alleged in the bill, a citizen of Georgia, the service was clearly good.

The provision of the Georgia law as to service of process applies to foreign corporations.

City Fire Insurance Co. v. *Carrugi*, 41 Ga. 660.
Equitable Life Ass'n v. *Gammon*, 119 Ga. 271.

Such a provision is constitutional and applies to service of process in suits in the federal courts if the foreign corporation is doing business in the state.

Conn. Mut. Life Ins. Co. v. *Spratley*, 172 U. S. 602.

The record showed that the only place of business of the Huguley Company was in Georgia. This allegation was nowhere denied. It may well be doubted whether this would not have been a valid service in an original proceeding. In the present suit, however, this question need not have been considered, for as service of process in an ancillary proceeding it was certainly good, and although made without any prior order of court, if objection had been taken the court would have made an order.

Bartlett v. *Sultan of Turkey*, 19 Fed. Rep. 346.

Assuming that this service was in any manner defective, so that on proper proceedings the court would not have sustained its validity, yet there was service of process and the defendants had appeared. The remedy for any defect was not to dismiss the bill, but to order the service set aside.

In *Harkness* v. *Hyde*, 98 U. S. 476, service of process, in an action for a malicious attachment of the plaintiff's property, was made upon the defendant at his residence on an Indian reservation. The defendant appeared

specially and moved to dismiss the action for defect of service. This court held that the service was bad, that the objection had not been waived and ordered the case remanded with directions to reverse the judgment for the plaintiff and to direct the court below to set aside the service made upon the defendant. The court said:

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground; or what we consider as intended, that the service be set aside." (Rec. p. 479.)

In like manner in *Goldey* v. *The Morning News*, 156 U. S. 518, the court set aside the service made upon the officer of a foreign corporation while temporarily in New York and did not dismiss the action.

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